

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
9

10 DAVID HAWK,

11 Petitioner,

12 v.

13 DAVID DAVEY, et al.,

14 Respondents.

Case No. 1:16-cv-00795-EPG-HC

FINDINGS AND RECOMMENDATION TO
GRANT PETITIONER'S APPLICATION TO
STAY AND ABEY PETITION

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

(ECF No. 2)

15
16 Petitioner is a state prisoner, represented by counsel, proceeding with a petition for writ
17 of habeas corpus pursuant to 28 U.S.C. § 2254.

18 **I.**

19 **BACKGROUND**

20 Petitioner challenges his convictions sustained in the Kings County Superior Court for
21 murder for financial gain, wilfully failing to file tax returns, misappropriating trust property in
22 excess of \$50,000, making false financial statement, and perjury. Petitioner was sentenced to life
23 without the possibility of parole plus nine years. (ECF No. 1 at 1).¹ The California Court of
24 Appeal, Fifth Appellate District, affirmed the judgment on August 27, 2014, and the California
25 Supreme Court denied the petition for review on November 12, 2014. The United States
26 Supreme Court denied certiorari on April 27, 2015. (Id. at 2). Petitioner's state habeas petitions
27 filed in the California Court of Appeal, Fifth Appellate District, and the California Supreme

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 Court were summarily denied on April 26, 2016, and June 8, 2016, respectively. (Id. at 3).

2 On June 8, 2016, Petitioner filed the instant petition for writ of habeas corpus. (ECF No.
3 1). Petitioner raises the following claims in his federal habeas petition: (1) the prosecution's
4 failure to provide exculpatory and impeachment evidence as required by Brady v. Maryland, 373
5 U.S. 83 (1963); (2) the required prejudice showing under Brady; (3) the trial court's failure to
6 grant change of venue; and (4) insufficient evidence to support Petitioner's murder conviction.

7 II.

8 DISCUSSION

9 A petitioner in state custody proceeding with a petition for writ of habeas corpus must
10 exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). A petitioner can satisfy the exhaustion
11 requirement by providing the highest state court with a full and fair opportunity to consider each
12 claim before presenting it to the federal court. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999);
13 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

14 Petitioner acknowledges that his fourth claim for relief is now unexhausted based on
15 newly discovered evidence. (ECF No. 1 at 5, ECF No. 2). Petitioner requests the Court to hold
16 the petition in abeyance pending resolution of the unexhausted claim in state court pursuant to
17 Rhines v. Weber, 544 U.S. 269 (2005). (ECF No. 2 at 3). Given "that a motion to stay and abey
18 section 2254 proceedings is generally (but not always) dispositive of the unexhausted claims,"
19 the undersigned shall submit findings and recommendation rather than rule on the motion.
20 Mitchell v. Valenzuela, 791 F.3d 1166, 1171, 1173–74 (9th Cir. 2015).

21 Under Rhines v. Weber, "stay and abeyance" is available only in limited circumstances,
22 and only when: (1) there is "good cause" for the failure to exhaust; (2) the unexhausted claims
23 are not "plainly meritless"; and (3) the petitioner did not intentionally engage in dilatory
24 litigation tactics. 544 U.S. at 277–78. Here, the victim's remains were discovered on March 22,
25 2016, and Petitioner has a motion pending in state court for the remains to be forensically
26 examined and for DNA evidence to be tested. The motion currently is set for hearing on August
27 29, 2016. (ECF No. 2 at 2). In his fourth claim for relief, Petitioner asserts that there was no
28 evidence that Petitioner had been present in the victim's home and van at the time of her

1 disappearance, and that the prosecution did not refute Petitioner's claim that he was not present.
2 (ECF No. 1 at 5). Petitioner contends that the newly discovered evidence provides additional
3 support that Petitioner was not present at the time of the homicide. (ECF No. 2 at 2). The Court
4 finds that there is good cause for the failure to exhaust, that the unexhausted claim is not plainly
5 meritorious, and that Petitioner has not intentionally engaged in dilatory litigation tactics. See
6 Gonzalez v. Wong, 667 F.3d 965, 980 (9th Cir. 2011).

7 **III.**

8 **RECOMMENDATION AND ORDER**

9 Based on the foregoing, IT IS HEREBY RECOMMENDED that Petitioner's application
10 to stay and abey the petition pursuant to Rhines be GRANTED. Further, the Court DIRECTS the
11 Clerk of Court to assign a District Court Judge to the present matter.

12 This Findings and Recommendation is submitted to the United States District Court
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304
14 of the Local Rules of Practice for the United States District Court, Eastern District of California.
15 Within **FOURTEEN (14) days** after service of the Findings and Recommendation, Petitioner
16 may file written objections with the Court and serve a copy on all parties. Such a document
17 should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The
18 assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
19 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may
20 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
21 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.

23
24 Dated: June 28, 2016

25 /s/ Eric P. Gray
26 UNITED STATES MAGISTRATE JUDGE
27
28