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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY NOBLE KENNEDY,  
Petitioner,  
v.  
KEVIN CHAPPELL, Warden of San  
Quentin State Prison,  
Respondent.

No. 2:13-cv-02041-KJM-KJN DP  
DEATH PENALTY CASE  
ORDER

Petitioner, a state prisoner proceeding through counsel, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. Before the court is petitioner’s motion to stay the case and hold it in abeyance pending the filing and resolution of an exhaustion petition in state court, ECF No. 53, as well as petitioner’s motion for an extension of time to file the exhaustion petition, ECF No. 79. On October 27, 2015, the magistrate judge filed findings and recommendations on petitioner’s motion for stay and abeyance, ECF No. 67, to which respondent has objected, ECF No. 73. As explained below, the court adopts the magistrate judge’s findings and recommendations, grants petitioner’s motion for stay and abeyance, and grants petitioner’s motion for an extension of time.

1 I. MOTION FOR STAY AND ABEYANCE

2 On June 26, 2015, petitioner filed his motion for stay and abeyance. ECF No. 53.  
3 Respondent opposed the motion, ECF No. 54, and petitioner replied, ECF No. 55. On October  
4 26, 2015, the magistrate judge held a status conference and hearing on petitioner's motion. ECF  
5 No. 66. On October 27, 2015, the magistrate judge filed findings and recommendations,  
6 recommending granting petitioner's motion under *Rhines v. Weber*, 544 U.S. 269 (2005), and  
7 *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014). ECF No. 67. The Supreme Court in *Rhines* held  
8 that stay and abeyance of a mixed petition is available when there was good cause for the  
9 petitioner's failure to exhaust certain claims, the unexhausted claims are not "plainly meritless,"  
10 and the petitioner has not engaged in intentionally dilatory litigation tactics. 544 U.S. at 277–78.  
11 Applying those requirements, the magistrate judge found good cause existed because petitioner  
12 made a sufficient showing that former habeas counsel Judd Iversen's abandonment of petitioner's  
13 case and subsequent local lead counsel Michael Clough's inexperience amounted to post-  
14 conviction ineffective assistance of counsel, and the California Supreme Court had denied  
15 petitioner's post-petition request for additional investigative funds. See ECF No. 67 at 6–8. In  
16 addition, the magistrate judge found petitioner's unexhausted claims were not "plainly meritless,"  
17 and nothing in the record indicated the unexhausted claims were intentionally raised late to delay  
18 the proceedings. *Id.* at 7–8. The magistrate judge recommended setting a deadline of April 26,  
19 2016 for petitioner to file his exhaustion petition in the California Supreme Court to allow Kelly  
20 Culshaw, newly assigned as counsel for petitioner, time to review the complex record and to  
21 identify any additional unexhausted claims. See *id.* at 1–2. On November 9, 2015, respondent  
22 timely filed objections to the findings and recommendations. ECF No. 73.

23 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304,  
24 this court has conducted a *de novo* review of petitioner's motion for stay and abeyance. Having  
25 carefully reviewed the file, the court finds the findings and recommendations to be supported by  
26 the record and by proper analysis. Accordingly, the court adopts the magistrate judge's findings  
27 and recommendations and grants petitioner's motion for stay and abeyance.

1 II. MOTION FOR EXTENSION OF TIME

2 On March 23, 2016, petitioner filed a motion for a sixty-day extension of the  
3 recommended deadline to file his exhaustion petition in the California Supreme Court. ECF  
4 No. 79. Petitioner requests the additional time to complete necessary investigation and to  
5 conclude informal discovery efforts. *Id.* at 1–2. First, petitioner notes that the magistrate judge,  
6 in recommending a six month filing period, had recognized the importance of allowing Ms.  
7 Culshaw the opportunity to identify any additional unexhausted claims. *See* ECF No. 67 at 1–2.  
8 Petitioner represents his counsel has identified “additional unexhausted facts and/or claims,” but  
9 requires additional time to substantiate them. ECF No. 79 at 2; *see* ECF No. 82 at 2.

10 Second, petitioner contends additional time is needed to conclude informal  
11 discovery efforts. ECF No. 79 at 2–3. According to petitioner, petitioner’s counsel previously  
12 made a similar discovery request to the Colusa County District Attorney’s Office in June 2015,  
13 but received no response. *Id.* at 2 n.1. Petitioner represents Davis Markss, a private investigator  
14 hired by the Colusa County District Attorney’s Office, is taking steps to locate additional records.  
15 *Id.* at 2–3. Petitioner argues additional investigation and discovery will promote judicial  
16 economy by avoiding piecemeal litigation of petitioner’s claims before the California Supreme  
17 Court and this court. *Id.* at 3; ECF No. 82 at 4.

18 Respondent opposes the motion for an extension of time, arguing petitioner has not  
19 shown good cause for the requested extension. ECF No. 81. Respondent contends petitioner’s  
20 informal discovery request is not only redundant and unnecessary, but is “abusive,” and therefore  
21 should not form the basis for any extension of the filing deadline. *Id.* at 2.

22 Both parties’ filings demonstrate that informal discovery is, in fact, proceeding and  
23 that it is at least possible additional relevant documents may be located. Although Mr. Markss  
24 states in his declaration that he never told Ms. Culshaw any additional documents exist, Markss  
25 Decl. ¶ 10, ECF No. 81-1, he also states that he told her he would contact officials in Sacramento  
26 and request they conduct a records search for additional discovery. *Id.* ¶¶ 11, 14. On March 21,  
27 2016, Mr. Markss sent petitioner’s discovery request to the Sacramento County District  
28 Attorney’s Office Bureau of Investigation, and they “responded that they will commence a

1 records search of the requested items.” *Id.* ¶ 13. The court finds the requested extension will  
2 serve the interests of justice and judicial economy.

3 Good cause appearing, the court grants petitioner’s motion for a sixty-day  
4 extension of time. The court will not grant future requests for an extension of time absent  
5 extraordinary circumstances.

6 III. CONCLUSION

7 For the foregoing reasons, the court orders the following:

8 1. The court adopts the magistrate judge’s October 27, 2015 findings and  
9 recommendations (ECF No. 67) and GRANTS petitioner’s motion for stay and abeyance pending  
10 the California Supreme Court’s resolution of petitioner’s exhaustion petition (ECF No. 53).

11 2. The court GRANTS petitioner’s motion for a sixty-day extension of time (ECF  
12 No. 79). Accordingly, petitioner shall file his exhaustion petition in the California Supreme Court  
13 no later than June 24, 2016. Should petitioner’s investigation substantiate the contemplated  
14 unexhausted facts and/or claims, petitioner shall move to lift the stay to so advise this court and to  
15 request a finding that such facts and/or claims are unexhausted no later than May 13, 2016. The  
16 court will not grant future requests for an extension of time absent extraordinary circumstances.

17 IT IS SO ORDERED.

18 DATED: April 18, 2016.

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22 UNITED STATES DISTRICT JUDGE  
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