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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DANIEL PENA,

Petitioner,

vs.

LARRY SMALL,

Respondent.

1:09-cv-1494-MJS (HC)

ORDER DENYING PETITIONER'S
MOTION TO STAY AND ABEY PETITION

ORDER GRANTING PETITIONER
EXTENSION OF TIME TO FILE
TRAVERSE

[Doc. 25]

THIRTY DAY DEADLINE

_____ /
Petitioner is a state prisoner proceeding pro se in a habeas corpus action pursuant to 28 U.S.C. § 2254. On August 18, 2009, Petitioner filed a petition for writ of habeas corpus raising three grounds for relief: (1) that the trial court erroneously denied his Wheeler/Batson motion alleging a prima facie case of discrimination by the prosecution in its use of peremptory challenges against Hispanic jurors, (2) that the trial court improperly instructed members of the jury to not exercise their right to have testimony read back to them, and (3) the use of jury instructions, CALCRIM Nos. 220 and 222, violated his due process rights. (Pet. at 4, 11, ECF No. 1.) On direct appeal, Petitioner presented the claims to the California Court of Appeal, Fifth Appellate District and the California Supreme Court. (Pet., Exs. A-B.)

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1 On August 20, 2010, Respondent filed an answer in response to the petition.
2 (Answer, ECF No. 18.) In the answer, Respondent acknowledges that Petitioner had
3 exhausted his claims in state court, and proceeds to address the claims on the merits.
4 (Id.) After filing two motions for extension of time to file a traverse, Petitioner has brought
5 the present motion to stay the petition to allow him to exhaust his state court remedies.
6 Despite Petitioner's assertion that he filed a mixed petition containing exhausted and
7 unexhausted claims, it appears that Petitioner has exhausted all of the claims contained
8 in his petition. Further, Respondent has acknowledged that Petitioner has exhausted his
9 claims, and addressed the claims on the merits. Accordingly, there is no need to stay the
10 petition to allow Petitioner to return to state court to exhaust his claims.

11 As Petitioner has not filed a mixed petition, and his claims are already exhausted,
12 Petitioner's motion to stay the petition is DENIED. In, perhaps, an over-abundance of
13 caution, the Court shall provide Petitioner a third extension of time to file a traverse to
14 Respondent's Answer. Petitioner is hereby GRANTED a thirty (30) day extension of time
15 from the date of service of this order to file a traverse.

16
17 IT IS SO ORDERED.

18 Dated: December 14, 2010

Michael J. Seng
UNITED STATES MAGISTRATE JUDGE