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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FREDRICK JONES JR.,	)	1:10-cv-00068-AWI-SKO-HC
	)	
Petitioner,	)	ORDER RE: FINDINGS AND
	)	RECOMMENDATIONS RE: RESPONDENT'S
	)	MOTION TO DISMISS THE PETITION
v.	)	(DOCS. 26, 18)
	)	
MIKE McDONALD, WARDEN,	)	ORDER ADOPTING FINDINGS THAT THE
	)	PETITION IS A MIXED PETITION
Respondent.	)	CONTAINING SPECIFIC EXHAUSTED AND
	)	UNEXHAUSTED CLAIMS (DOC. 26, 1)
		)
		ORDER DENYING IN PART
		RESPONDENT'S MOTION TO DISMISS
		THE PETITION (DOC. 18)
		ORDER REFERRING THE ACTION TO
		THE MAGISTRATE JUDGE FOR
		CONSIDERATION OF PETITIONER'S
		MOTION FOR A STAY (DOC. 32)

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court are findings and recommendations filed on February 24, 2011, to grant Respondent's motion to dismiss the petition as a "mixed" petition containing both exhausted and unexhausted claims, and 2) Petitioner's

1 objections to the findings and recommendations, filed on June 3,  
2 2011, which included his motion for a stay of the proceedings.

3 I. Background

4 Petitioner's claims in this case concern a criminal  
5 conviction and errors allegedly occurring during the pretrial and  
6 trial proceedings as well as during a limited remand ordered upon  
7 an initial appeal from the conviction in which the trial court  
8 was directed to determine if a retrospective competency hearing  
9 was feasible, to hold a retrospective hearing if possible, and to  
10 affirm the judgment of conviction if Petitioner were found to be  
11 competent.

12 Respondent filed a motion to dismiss the petition on October  
13 15, 2010. In the findings and recommendations concerning the  
14 motion that were filed by the Magistrate Judge, it was concluded  
15 that the following claims raised in the petition were exhausted:

- 16 1) Petitioner's third claim that the appellate court erred in the  
17 initial appeal by not responding to Petitioner's issue concerning  
18 the trial court's ruling on his motion for ancillary funds; and  
19 2) Petitioner's fourth claim that the appellate remand to the  
20 trial court and the competency trial held on remand were  
21 improperly limited to Petitioner's competence to stand trial, and  
22 did not include adequate consideration of Petitioner's competence  
23 to assist counsel or waive counsel.

24 However, it was concluded that the following claims raised  
25 in the petition had not been presented to the California Supreme  
26 Court and thus were not exhausted: 1) Petitioner's first claim  
27 that in the initial appeal, the appellate court erred by  
28 remanding, but not reversing, the judgment in Petitioner's case

1 when it found that Petitioner was denied counsel in a competency  
2 proceeding; 2) Petitioner's second, two-part claim that on  
3 remand, the trial court erred by finding that a retrospective  
4 competency determination was feasible, and by placing the burden  
5 on Petitioner to prove incompetence; 3) Petitioner's third claim  
6 that the appellate court erred in the initial appeal by not  
7 responding to grounds raised in the opening brief that included  
8 the absence of representation by counsel at the competency  
9 hearings, the argument that a retrospective competency hearing  
10 would not remedy the situation, the trial court's failure to  
11 perform its duty to revoke Petitioner's pro se status when it was  
12 apparent that he was unable or unwilling to abide by procedural  
13 rules, motions to disqualify judges and for ancillary services,  
14 the erroneous failure of the trial court to appoint another judge  
15 to determine what ancillary funds would be granted to Petitioner,  
16 the trial court's holding of hearings on funding in the presence  
17 of the County Counsel and permitting County Counsel to argue  
18 against funding, and the trial court's improper response to the  
19 motion for ancillary funds under California case law and  
20 statutory law; 4) Petitioner's fifth claim that the trial court  
21 failed to explain to Petitioner that he had a right to appointed  
22 counsel during the competency hearing; 5) Petitioner's sixth  
23 claim that the trial court erred in not appointing Petitioner his  
24 counsel of choice for the competency proceedings on remand; 6)  
25 Petitioner's seventh claim that the trial court erred by finding  
26 that the prosecution had demonstrated that two doctors' reports  
27 constituted a preponderance of the evidence of competence; 7)  
28 Petitioner's eighth, two-part claim that the trial court erred by

1 not appointing counsel during the first competency hearing and  
2 then, after remand, by appointing a "Conflict of Int[e]rest  
3 Counsel" over Petitioner's objections and despite three Marsden  
4 hearings (pet. 13); 8) Petitioner's ninth claim (apparently a  
5 repetition of the second portion of his second claim) that during  
6 the competency proceedings after remand, the trial court erred by  
7 placing the burden of proof on Petitioner instead of requiring an  
8 affirmative showing of competency by the prosecution; and 9)  
9 Petitioner's tenth claim that the lower courts overlooked  
10 Petitioner's claim pursuant to People v. James Ary, Jr., 173  
11 Cal.App.4th 80 (2009).

12 In the findings and recommendations, the Magistrate Judge  
13 recommended that the Court grant Petitioner thirty (30) days to  
14 file a motion to withdraw the unexhausted claims; if Petitioner  
15 did not file such a motion, the Court would assume that  
16 Petitioner desired to return to state court to exhaust the  
17 unexhausted claims, and the Court would grant the motion to  
18 dismiss and would dismiss the petition without prejudice.

19 The findings and recommendations were served on Petitioner  
20 on February 24, 2011.

21 Pursuant to Petitioner's motion for an extension of time to  
22 file objections, the Court extended the deadline until on or  
23 about May 10, 2011. (Doc. 30.) On June 3, 2011, Petitioner  
24 filed objections along with a motion for a stay and abeyance of  
25 the action. The objections and request for stay were served on  
26 Respondent on May 31, 2011. (Doc. 32, 52.) In the objections,  
27 Petitioner detailed his problems gaining access to the law  
28 library and receiving notice of the action taken on his request

1 for an extension of time to file objections. (Doc. 32, 2.)  
2 Respondent has not raised any argument concerning alleged  
3 untimeliness of the objections. The Court thus considers  
4 Petitioner's objections to be timely.

5 Although the findings and recommendations granted Respondent  
6 fourteen days to reply to any objections, Respondent has not  
7 replied to the objections despite the passage of the fourteen-day  
8 period for doing so.

9 It is further noted that pursuant to local rules, the time  
10 for filing an opposition to the motion for a stay has passed, but  
11 no opposition has been filed by Respondent.

12 II. Adoption of the Magistrate Judge's Findings and  
13 Recommendations

14 In accordance with the provisions of 28 U.S.C. § 636  
15 (b) (1) (C), this Court has conducted a *de novo* review of the case.  
16 The undersigned has carefully reviewed the entire file and has  
17 considered the objections; the undersigned has determined there  
18 is no need to modify the findings and recommendations based on  
19 the points raised in the objections. The Court finds that the  
20 report and recommendation is supported by the record and proper  
21 analysis with respect to the findings that Petitioner exhausted  
22 some claims in the petition but failed to exhaust state court  
23 remedies with respect to other claims in the petition.

24 However, after the Magistrate Judge filed the findings and  
25 recommendations, Petitioner filed a motion for a stay of the  
26 petition in order to permit Petitioner to exhaust state court  
27 remedies without complying with the recommendation of the  
28 Magistrate Judge, which was to require Petitioner to amend the

1 petition to withdraw unexhausted claims before proceeding with  
2 the petition. Petitioner thus appears to be seeking a stay  
3 pursuant to Rhines v. Weber, 544 U.S. 269 (2005). Petitioner  
4 seeks relief in the motion for a stay that relates to and  
5 potentially affects the Respondent's prayer for dismissal in the  
6 motion to dismiss. Further, in view of Respondent's failure to  
7 file opposition to the motion for a stay, the motion is ripe for  
8 decision.

9 Accordingly, the Court will adopt the findings of the  
10 Magistrate Judge concerning the mixed nature of the petition and  
11 the claims alleged therein.

12 However, in view of the pendency of Petitioner's motion for  
13 a Rhines stay, the Court will decline to adopt the Magistrate  
14 Judge's recommendation that the Court order the immediate  
15 amendment of the petition or dismissal of the case. Instead, the  
16 Court will refer motion for a stay to the Magistrate Judge, who  
17 can consider and decide the question of the appropriate  
18 disposition of the mixed petition upon consideration of  
19 Petitioner's motion for a stay.

20 Accordingly, it is ORDERED that:

21 1) The findings and recommendations filed on February 24,  
22 2011, are ADOPTED in part insofar as they determine that  
23 Petitioner's petition is a mixed petition containing specific,  
24 exhausted and unexhausted claims; and

25 2) Respondent's motion to dismiss the petition is DENIED in  
26 part insofar as Respondent sought by the motion the immediate  
27 amendment or dismissal of the petition; and

28 3) The case is REFERRED to the Magistrate Judge for

1 consideration and determination of Petitioner's motion for a stay  
2 of the proceedings to permit him to exhaust claims without  
3 amending the petition to delete unexhausted claims.

4 IT IS SO ORDERED.

5 Dated: September 11, 2011

  
6 CHIEF UNITED STATES DISTRICT JUDGE

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