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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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|--------------------------|---|------------------------------------|
| ROBERT GEORGE JEFF, III, |) | 1:10-cv-01510-JLT HC |
| |) | |
| Petitioner, |) | ORDER GRANTING PETITIONER’S |
| |) | MOTION FOR STAY OF PROCEEDINGS |
| v. |) | ON PETITION FOR WRIT OF HABEAS |
| |) | CORPUS (Doc. 2) |
| |) | |
| MATTHEW CATE, et al., |) | ORDER DIRECTING CLERK OF COURT |
| |) | TO ADMINISTRATIVELY CLOSE CASE |
| Respondents. |) | ORDER DIRECTING PETITIONER TO FILE |
| _____ |) | REGULAR STATUS REPORTS |
| |) | |
| |) | ORDER DIRECTING PETITIONER TO |
| |) | NOTIFY COURT WITHIN THIRTY DAYS |
| |) | OF ANY FINAL ORDER REGARDING |
| |) | EXHAUSTION OF GROUND 8 |

Petitioner is a state prisoner proceeding through retained counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner originally filed his federal petition on August 18, 2010. (Doc. 2). In that instant petition, Petitioner challenges his 2007 conviction and the resulting 18-years-to-life sentence in the Kings County Superior Court for gross vehicular manslaughter while intoxicated, driving under the influence of alcohol and causing bodily injury to another, failure to stop at the scene of an injury accident, and driving with a license suspended or revoked for driving under the influence of a drug or alcohol. The petition raises the following grounds for relief: (1) error in denial of Petitioner’s

1 pre-trial Trombetta motion;¹ (2) error in denial of Petitioner’s motion for new trial on Trombetta
2 grounds; (3) denial of Petitioner’s motion for new trial; (4) failure to afford Petitioner a timely
3 arraignment; (5) failure to afford Petitioner a timely preliminary hearing; and (6) ineffective
4 assistance of trial counsel in failing to conduct a proper investigation. (Doc. 2).

5 Although Petitioner does not provide a copy of the Petition for Review filed in the California
6 Supreme Court, and although Petitioner does not expressly delineate which claims are exhausted and
7 which are not, it appears to the Court that Grounds One, Two, and Three may have been exhausted,
8 but that Grounds Four, Five, and Six may not have been. In the petition, Petitioner appears to
9 request a stay of the case while he exhausts the latter three grounds through habeas corpus
10 proceedings already commenced in the state courts.

11 DISCUSSION

12 Traditionally, a district court has had the discretion to stay a petition which it may validly
13 consider on the merits. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 987-988 (9th
14 Cir. 1998); Greenawalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir.), *cert. denied*, 519 U.S. 1002
15 (1997). However, the Ninth Circuit has held that Taylor in no way granted “district courts carte
16 blanche to stay even fully exhausted habeas petitions.” Taylor, 134 F.3d at 988 n. 11. Granting a
17 stay is appropriate where there is no intention on the part of the Petitioner to delay or harass and in
18 order to avoid piecemeal litigation. Id. In addition, the Ninth Circuit has indicated that it is proper
19 for a district court, in its discretion, to hold a petition containing only exhausted claims in abeyance
20 in order to permit the petitioner to return to state court to exhaust his state remedies. Kelly v. Small,
21 315 F.3d 1063, 1070 (9th Cir. 2004); Ford v. Hubbard, 305 F.3d 875, 882-883 (9th Cir. 2002); James
22 v. Piler, 269 F.3d 1124, 1126-1127 (9th Cir. 2002); Taylor, 134 F.3d 981.

23 Notwithstanding the foregoing, until recently, federal case law continued to require that the
24 Court dismiss “mixed” petitions containing both exhausted and unexhausted claims. Rose v. Lundy,
25 455 U.S. 509 (1982). That changed with the United States Supreme Court’s decision in Rhines v.
26 Weber, 544 U.S. 269 (2005). Recognizing that “[a]s a result of the interplay between AEDPA’s 1-

27
28 ¹California v. Trombetta, 467 U.S. 479 (1984).

1 year statute of limitations² and Lundy's dismissal requirement, petitioners who come to federal court
2 with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their
3 unexhausted claims," the Supreme Court held that federal courts may now issue "stay and abey"
4 orders under appropriate circumstances to permit petitioners to exhaust unexhausted claims before
5 proceeding with their federal petitions. Rhines, 544 U.S. at 276-277. In so holding, the Supreme
6 Court noted that the procedure should be "available only in limited circumstances." 544 U.S. at 277.
7 Specifically, the Court said it was appropriate only when (1) good cause exists for petitioner's failure
8 to exhaust; (2) petitioner's unexhausted claims are not "plainly meritless" and (3) there is no
9 indication that petitioner engaged in "abusive litigation tactics or intentional delay." Id. at 277-278;
10 Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2005). When a petitioner has met these
11 requirements, his interest in obtaining federal review of his claims outweighs the competing interests
12 in finality and speedy resolution of federal petitions. Rhines, 544 U.S. at 278.

13 In a ruling subsequent to Rhines, the Ninth Circuit re-affirmed the vitality of *both* the Rhines
14 two-step stay procedure as well as the Kelly three-step stay procedure:

15 Rhines allows a district court to stay a mixed petition, and does not require that unexhausted
16 claims be dismissed while the petitioner attempts to exhaust them in state court. In contrast,
17 the three-step procedure outlined in Kelly allows the stay of fully exhausted petitions,
18 requiring that the unexhausted claims be dismissed.

19 King v. Ryan, 564 F.3d 1133, 1139-1140 (9th Cir. 2009).

20 There are, however, significant distinctions between the two procedures. First, claims
21 exhausted during a Rhines stay are not subject to timeliness challenges since the mixed petition
22 remains pending throughout the stay procedure. Id. at p. 1140. In contrast, any claim exhausted
23 during a Kelly stay must "relate back" to the claims in the original petition under the doctrine set
24 forth in Mayle v. Feliz, 545 U.S. 644 (2005), or else be timely filed under the AEDPA's one-year
25 statute of limitation. Id. Additionally, petitioners seeking to avail themselves of a Rhines stay must
26 make the additional showing of good cause, something not required under Kelly. Id. at 1143.

27 Here, it appears that Petitioner is seeking to invoke the Rhines procedure since he is not
28 requesting dismissal of the unexhausted claims, but rather seeks a stay of this mixed petition until

²The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 1244(d).

1 such time as the unexhausted claims have been exhausted. That appears to be precisely the scenario
2 that the Rhines procedure was designed to cover:

3 “Rhines applies to stays of *mixed* petitions, whereas the [Kelly] three-step procedure applies
4 to stays of *fully exhausted* petitions....”

5 King, 564 F. 3d at 1140, *quoting Jackson v. Roe*, 425 F. 3d 654, 661 (9th Cir. 2005). (Emphasis in
6 original).

7 Under Rhines, the Court must first determine whether good cause exists for Petitioner’s
8 failure to exhaust and whether there is any indication that Petitioner engaged in “abusive litigation
9 tactics or intentional delay.” Rhines, 544 U.S. at 277-278. Petitioner has appended various
10 declarations to his petition which indicate that his retained counsel has diligently proceeded with an
11 investigation of claims that were not raised in the direct appeal. Although retained counsel has
12 experienced various unexpected medical delays in the course of his investigation, nothing in the
13 record suggests in any way that either Petitioner or his retained counsel have been anything other
14 than diligent. Moreover, the fact that two of the three unexhausted claims require detailed legal
15 knowledge that is normally beyond the ken of a pro se petition, and the fact that the ineffective
16 assistance of counsel claim relies in part upon facts that have only recently come to light through
17 further investigation by retained counsel, provide a further basis for the Court’s finding that there is
18 good cause for Petitioner’s failure to exhaust these three claims at an earlier point in the criminal
19 justice process. Nothing in the record suggests that Petitioner has engaged in “abusive litigation
20 tactics or intentional delay.” Therefore, neither of these criteria presents an obstacle to granting a
21 stay under Rhines.

22 Additionally, in order to grant a Rhines stay, the Court must also make a finding that the
23 claim or claims a petitioner is seeking to exhaust are not “plainly meritless.” Rhines, 544 U.S. at
24 277-278. Here, Petitioner has included lengthy legal argument, as well as various declarations, to
25 support his allegations that the state court failed to provide timely arraignment and preliminary
26 hearing proceedings, and also that trial counsel was ineffective. The Court expresses no opinion
27 regarding the likelihood that such claims would ultimately entitle Petitioner to relief in these
28 proceedings; suffice it to say that, based on Petitioner’s allegations and supporting evidence, the

1 Court cannot, at this juncture, find that Grounds Four, Five, and Six are “plainly meritless.”
2 Therefore, good cause having been presented and good cause appearing therefore, the Court will
3 grant Petitioner’s motion for a stay of the proceedings and will hold the petition for writ of habeas
4 corpus in abeyance pending exhaustion of Petitioner’s state remedies.

5 However, the Court will not indefinitely hold the petition in abeyance. See Taylor, 134 F.3d
6 at 988 n. 11. No later than thirty (30) days after the date of service of this Order Petitioner must
7 inform the Court of the status of the habeas proceedings in state court, including the dates his cases
8 were filed, the case numbers, and any outcome.³ Further, Petitioner must proceed diligently to
9 pursue his state court remedies, and every sixty (60) days after the filing of the initial status report
10 Petitioner must file a *new* status report regarding the status of his state court habeas corpus
11 proceedings. Following final action by the state courts, Petitioner will be allowed thirty (30) days
12 within which to notify the Court that he has fully exhausted Grounds Four, Five, and Six. At that
13 point, the Court will issue a briefing schedule regarding the claims in the instant petition. Failure to
14 comply with these instructions and time allowances will result in this Court vacating the stay *nunc*
15 *pro tunc* to the date of this order. Rhines, 544 U.S. at 277-278.

16 **ORDER**

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. Petitioner’s motion to stay the instant proceedings on his habeas petition (Doc. 2), is
19 GRANTED;
- 20 2. Proceedings on the instant petition are STAYED pending exhaustion of Petitioner’s state
21 remedies;
- 22 3. Petitioner is **DIRECTED to file a status report within thirty (30) days** of the date of
23 service of this order, advising the Court of the status of all pending habeas proceedings filed
24 in state court, the dates when such cases were filed, and any outcomes;
- 25 4. Petitioner is **DIRECTED to file a new status report every sixty (60) days** after the filing of
26 the initial status report; and
- 27 5. Petitioner is **DIRECTED to notify the Court within thirty days** of any final order of the

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³The filing should be entitled “Status Report.”

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state courts regarding newly exhausted grounds;
6. The Clerk of the Court is DIRECTED to ADMINISTRATIVELY CLOSE the case. The Court will direct the Clerk of the Court to re-open the case when and if the stay is lifted.

IT IS SO ORDERED.

Dated: September 30, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE