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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 SEMAJ LEON FRAZIER,) Case No.: 1:14-cv-01146-JLT
12)
13) Petitioner,) ORDER GRANTING PETITIONER’S MOTION
14) TO STAY PROCEEDINGS (Doc. 3)
15)
16) v.)
17) ORDER FOR PETITIONER TO FILE REGULAR
18) STATUS REPORTS
19)
20) W. L. MONTGOMERY,)
21) Respondent.)
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29 Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas
30 corpus pursuant to 28 U.S.C. § 2254.

31 **PROCEDURAL HISTORY**

32 The instant petition was filed on July 23, 2014. (Doc. 1). The petition, which challenges
33 Petitioner’s August 29, 2011 conviction in the Kings County Superior Court for various sexual assault
34 crimes, raises the following six claims: (1) insufficient evidence to convict Petitioner of rape and
35 assault; (2) insufficient evidence to support “the convictions”; (3) use of an improper prior conviction
36 to enhance the sentence; (4) instructional error; (5) ineffective assistance of trial counsel; and (6)
37 ineffective assistance of appellate counsel. (Doc. 1, pp. 4-6).

38 Contemporaneous with the filing of the petition, Petitioner filed the instant motion to stay
39 proceedings in this case while he exhausts the two ineffective assistance claims in state court. (Doc. 3).
40 Respondent has not entered an appearance or otherwise filed an opposition to the motion to stay

1 proceedings.

2 DISCUSSION

3 Traditionally, a district court has had the discretion to stay a petition which it may validly
4 consider on the merits. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 987-988 (9th Cir.
5 1998); Greenawalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir.), *cert. denied*, 519 U.S. 1002 (1997).
6 However, the Ninth Circuit has held that Taylor in no way granted “district courts carte blanche to stay
7 even fully exhausted habeas petitions.” Taylor, 134 F.3d at 988 n. 11. Granting a stay is appropriate
8 where there is no intention on the part of the Petitioner to delay or harass and in order to avoid
9 piecemeal litigation. Id. In addition, the Ninth Circuit has indicated that it is proper for a district court,
10 in its discretion, to hold a petition containing only exhausted claims in abeyance in order to permit the
11 petitioner to return to state court to exhaust his state remedies. Kelly v. Small, 315 F.3d 1063, 1070 (9th
12 Cir. 2004); Ford v. Hubbard, 305 F.3d 875, 882-883 (9th Cir. 2002); James v. Pliler, 269 F.3d 1124,
13 1126-1127 (9th Cir. 2002); Taylor, 134 F.3d 981.

14 Notwithstanding the foregoing, federal case law continued to require the Court to dismiss
15 “mixed” petitions containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509
16 (1982). However, in 2005, the United States Supreme Court decided Rhines v. Weber, 544 U.S. 269,
17 125 S.Ct. 1528 (2005). Recognizing that “[a]s a result of the interplay between AEDPA’s 1-year
18 statute of limitations¹ and Lundy’s dismissal requirement, petitioners who come to federal court with
19 ‘mixed’ petitions run the risk of forever losing their opportunity for any federal review of their
20 unexhausted claims,” the Supreme Court held that federal courts may now issue “stay and abey” orders
21 under appropriate circumstances to permit petitioners to exhaust unexhausted claims before proceeding
22 with their federal petitions. Rhines, 544 U.S. at 275. In so holding, the Supreme Court noted that,
23 while the procedure should be “available only in limited circumstances,” it “likely would be an abuse of
24 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good
25 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no
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28 ¹The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 1244(d).

1 indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines, 544 U.S. at
2 278. When a petitioner has met these requirements, his interest in obtaining federal review of his
3 claims outweighs the competing interests in finality and speedy resolution of federal petitions. Id.

4 Here, Petitioner has timely filed a federal habeas petition containing four claims exhausted
5 through state habeas corpus proceedings, and two claims of ineffective assistance that are
6 unexhausted. Petitioner indicates that he has initiated state court habeas proceedings to exhaust those
7 two claims. Thus, it appears to the Court that Petitioner is attempting to exhaust his claims in a timely
8 and expeditious manner, and there is no indication that, in seeking this stay and abeyance, Petitioner
9 intends to harass or delay the proceedings nor does it appear that Petitioner is engaging in dilatory
10 conduct. Although the Court is not prepared at this time to make an assessment of the merits of the
11 four exhausted claims in the instant petition, a preliminary review of those claims indicates that
12 Petitioner has alleged colorable constitutional violations. Moreover, it appears that Petitioner is
13 proceeding in good faith and that no prejudice would inure to the parties by granting the requested
14 stay. Therefore, good cause having been presented and good cause appearing therefore, the Court will
15 grant Petitioner’s motion for a stay of the proceedings and will hold the petition for writ of habeas
16 corpus in abeyance pending exhaustion of Petitioner’s state remedies.

17 However, the Court will not indefinitely hold the petition in abeyance. See Taylor, 134 F.3d at
18 988 n. 11. No later than 30 days after the date of service of this Order Petitioner must inform the
19 Court of the status of the habeas proceedings in state court, including the dates his cases were filed, the
20 case numbers, and any outcomes.² Further, Petitioner must proceed diligently to pursue his state court
21 remedies, and every 60 days after the filing of the initial status report Petitioner must file a *new* status
22 report regarding the status of his state court habeas corpus proceedings. Following final action by the
23 state courts, Petitioner will be allowed 30 days within which to file a motion for leave to amend the
24 instant petition to include the newly exhausted claims. Failure to comply with these instructions and
25 time allowances will result in this Court vacating the stay *nunc pro tunc* to the date of this order.
26 Kelly, 315 F.3d at 1071.

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² The filing should be entitled “Status Report.”

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