UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

OMAR CEBRERO,) Case No.: 1:16-cv-00173-JLT
Petitioner,	ORDER GRANTING PETITIONER'S MOTION TO STAY PROCEEDINGS (Doc. 1)
v. S. FRAUENHEIM,	ORDER FOR PETITIONER TO FILE REGULAR STATUS REPORTS
Respondent.))

Petitioner requested a stay to exhaust five claims. Plaintiff has now provided additional detail about these claims. As a result, the Court will order the matter stayed to allow Petitioner time to exhaust these claims.

I. Discussion

A court has had the discretion to stay a petition. <u>Calderon v. United States Dist. Court</u> (<u>Taylor</u>), 134 F.3d 981, 987-988 (9th Cir. 1998); <u>Greenawalt v. Stewart</u>, 105 F.3d 1268, 1274 (9th Cir.), *cert. denied*, 519 U.S. 1002 (1997). Granting a stay is appropriate where there is no intention on the part of the Petitioner to delay or harass and in order to avoid piecemeal litigation. <u>Id</u>. Where the petition contains only exhausted claims, still the court may hold it in abeyance to allow exhaustion of other claims. <u>Kelly v. Small</u>, 315 F.3d 1063, 1070 (9th Cir. 2004).

Notwithstanding the foregoing, federal case law continued to require that the Court dismiss "mixed" petitions containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509

(1982). However, in Rhines v. Weber, 544 U.S. 269, (2005) the Court recognized that "[a]s a result of the interplay between AEDPA's 1-year statute of limitations¹ and Lundy's dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims." Thus, federal courts may now issue "stay and abey" orders under appropriate circumstances to permit petitioners to exhaust claims before proceeding with their federal petitions. Rhines, 544 U.S. at 275. IWhile the procedure should be "available only in limited circumstances," it "likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Rhines, 544 U.S. at 278. When a petitioner has met these requirements, his interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. Id.

Here, Petitioner has timely filed a federal habeas petition containing seven claims exhausted through state habeas corpus proceedings. He has also indicated that he wishes to initiate state court habeas proceedings to exhaust five additional claims which he hopes to be able to include in the instant petition. Thus, it appears to the Court that Petitioner is prepared to exhaust his claims in a timely and expeditious manner, and there is no indication that, in seeking this stay and abeyance, Petitioner intends to harass or delay the proceedings nor does it appear that Petitioner is engaging in dilatory conduct. Although the Court is not prepared at this time to make a final assessment of the merits of the five unexhausted claims in the instant petition, a preliminary review of that claim indicates that Petitioner has sufficiently alleged a constitutional violation for each of those unexhausted claims. Moreover, it appears that Petitioner is proceeding in good faith and that no prejudice would inure to the parties by granting the requested stay.

Therefore, good cause having been presented and good cause appearing therefore, the Court will grant Petitioner's motion for a stay of the proceedings and will hold the petition for writ of habeas corpus in abeyance pending exhaustion of Petitioner's state remedies.

¹The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA), 28 U.S.C. § 1244(d).

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

ORDER

Accordingly, the Court **ORDERS**:

- 1. Petitioner's motion to stay the instant proceedings on his habeas petition (Doc. 1) is **GRANTED**;
- 2. Proceedings on the instant petition are **STAYED** pending exhaustion of Petitioner's state remedies as to claims seven through twelve;
- 3. Petitioner **SHALL** file a status report <u>within 30 days</u> of the date of service of this order, advising the Court of the status of all pending habeas proceedings filed in state court, the dates when such cases were filed, and any outcomes;
- 4. Petitioner **SHALL** file a new status report <u>every 60 days</u> after the filing of the initial status report, regardless of whether the state courts have acted on his petition;

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² The filing should be entitled "Status Report."

5. Petitioner is **GRANTED** 30 days following the final order of the state courts within which to file a motion for leave to amend the petition to include the newly exhausted claims. IT IS SO ORDERED. /s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE Dated: March 10, 2016