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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TYRIN LEE BLOUNT,  
Petitioner,  
v.  
DAVID DAVEY, Warden,  
Respondent.

No. 1:16-cv-01653-DAD-SKO HC

**ORDER DENYING RESPONDENT’S  
MOTION TO DISMISS AND GRANTING  
PETITIONER’S MOTION FOR  
STAY AND ABEYANCE**

**(Docs. 11 and 12)**

Petitioner Tyrin Lee Blount is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss for failure to exhaust, and Petitioner moves for an order of stay and abeyance to permit him to exhaust his unexhausted claims in state court. In accordance with the policy expressed in *Rhines v. Weber*, 544 U.S. 269, 275 (2005), the Court denies the motion to dismiss and enters an order of stay and abeyance.

**I. Procedural and Factual Background**

Petitioner is serving a 17-year sentence following his conviction in Kern County Superior Court on charges of burglary (Cal. Penal Code § 460(a) and (b)) and participating in felony street gang activity (Cal. Penal Code § 186.22(a)). Petitioner and his co-defendants filed a direct appeal to the California Court of Appeal, which affirmed the judgment of conviction in a modified opinion dated June 18, 2015. Issues addressed by the appellate court were: (1) admission of impermissibly suggestive show-up identification by the burglary victims; (2) failure to exclude admissions of gang membership at booking by Petitioner and his co-defendants under *Miranda*<sup>1</sup>;

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 (3) failure to exclude admissions of gang membership at booking as (a) involuntary, (b) under the  
2 principle of use immunity, and (c) under the doctrine of estoppel; (4) improper *ex parte* contact  
3 with jurors during a readback request; (5) trial court's error in refusing to accept or to require the  
4 prosecution to accept the defendants' proposed stipulation concerning the Country Boy Crips; (6)  
5 insufficient evidence that the Watts/Lotus Country Boy Crips, the gang to which Petitioner  
6 belonged, was a criminal street gang under Cal. Penal Code § 186.22; and (7) failure to suppress  
7 co-defendant Randles' admission of gang membership. *See People v. Blount*, 2015 WL 3814496  
8 at \*1 (Cal. App. June 18, 2015) (Nos. F066744 and F067069).

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10 On July 23, 2015, Petitioner filed a petition for review by the California Supreme Court  
11 alleging a single claim: whether the trial court erred in admitting impermissibly suggestive show-  
12 up identification by the burglary victims. The Supreme Court denied review on September 23,  
13 2015.

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15 Petitioner filed a petition for writ of habeas corpus in Kern County Superior Court on  
16 February 5, 2016. His only claim alleged that insufficient evidence supported the conviction of  
17 first degree residential burglary. The Superior Court denied the claim on June 3, 2016. Petitioner  
18 then repeated the claim in a petition for writ of habeas corpus filed in the California Court of  
19 Appeal on June 21, 2016. The Court of Appeal summarily denied the petition on July 21, 2016.  
20 The record does not include a habeas petition filed with the California Court of Appeal.

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22 Petitioner filed a petition for writ of habeas corpus in this Court on November 2, 2016.  
23 Petitioner alleged the following grounds for relief: (1) admission of impermissibly suggestive  
24 show-up identification by the burglary victims; (2) failure to exclude admissions of gang  
25 membership at booking by petitioner and his co-defendants under *Miranda*; (3) Petitioner's  
26 statements to police, made shortly after his booking, were involuntary as the result of a promise  
27 of leniency; (4) improper *ex parte* contact with jurors during readback request; (5) trial court's  
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1 error in refusing to accept or to require the prosecution to accept the defendants' proposed  
2 stipulation concerning the Country Boy Crips; and (6) insufficient evidence that the Watts/Lotus  
3 Country Boy Crips, the gang to which Petitioner belonged, was a criminal street gang under Cal.  
4 Penal Code § 186.22. On January 6, 2017, Respondent moved to dismiss the petition on the  
5 ground that it included unexhausted claims. On January 23, 2017, Petitioner moved for an order  
6 of stay and abeyance to permit exhaustion of those claims. Respondent filed an opposition to the  
7 motion for stay on February 10, 2017.

9 **II. Exhaustion of State Remedies**

10 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
11 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
12 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
13 opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501  
14 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*, 854 F.2d 1158,  
15 1163 (9<sup>th</sup> Cir. 1988).

17 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
18 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
19 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971);  
20 *Johnson v. Zenon*, 88 F.3d 828, 829 (9<sup>th</sup> Cir. 1996). A federal court will find that the highest state  
21 court was given a full and fair opportunity to hear a claim if the petitioner has presented the  
22 highest state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365; *Kenney v.*  
23 *Tamayo-Reyes*, 504 U.S. 1, 8 (1992).

25 Petitioner concedes that he has exhausted only the first claim in his federal petition:  
26 whether the trial court erred in admitting impermissibly suggestive show-up identification by the  
27 burglary victims. Because the five remaining grounds for collateral relief are unexhausted, the  
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1 Court is generally required to dismiss the petition as a mixed petition. 28 U.S.C. § 2254(b)(1);  
2 *Rose*, 455 U.S. at 521-22.

3 **III. Motion for Stay and Abeyance to Permit Exhaustion**

4 In response to dismissal motion, Petitioner moved for an order of stay and abeyance  
5 pursuant to *Rhines v. Weber*, 544 U.S. 269, 275 (2005), so that he can present the unexhausted  
6 claims to the California Supreme Court. Respondent opposes the stay motion, contending that  
7 Petitioner has failed to demonstrate good cause for the issuance of a stay.  
8

9 Federal district courts should stay mixed petitions only in limited circumstances. *Id.* at  
10 277. A district court may stay a mixed petition if (1) the petitioner demonstrates good cause for  
11 failing to have first exhausted all claims in state court; (2) the claims potentially have merit; and  
12 (3) petitioner has not been dilatory in pursuing the litigation. *Id.* at 277-78. Support for these  
13 requirements in Petitioner's case is weak.  
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15 Petitioner contends that his lack of familiarity with applicable law and limited access to  
16 the prison law library constitute good cause. In that regard, Petitioner's situation is no different  
17 than that of most other inmates. *Rhines* does not define what constitutes good cause for failure to  
18 exhaust, however, and the Ninth Circuit has provided no clear guidance beyond holding that the  
19 test is less stringent than an "extraordinary circumstances" standard. *Jackson v. Roe*, 425 F.3d  
20 654, 661-62 (9<sup>th</sup> Cir. 2005). If the claims are not "plainly meritless," and if the delays are not  
21 intentional or attributable to abusive tactics, the *Rhines* court opined that a district court would  
22 abuse its discretion in denying a stay. 544 U.S. at 278.  
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24 Nothing in the record suggests that Petitioner has intentionally or maliciously failed to  
25 pursue his potentially meritorious claims. Accordingly, the Court will grant stay and abeyance  
26 under *Rhines*.

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