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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR PABLO TORRES,
Petitioner,

v.

SUZANNE PERRY, Warden,
Respondent.

No. 1:17-cv-00169-LJO-JLT (HC)
**ORDER DECLINING TO ADOPT
FINDINGS AND RECOMMENDATIONS
(Doc. No. 6)**

**ORDER GRANTING PETITIONER’S
MOTION FOR STAY AND ABEYANCE
(Doc. No. 11)**

**ORDER DIRECTING PETITIONER TO
FILE REGULAR STATUS REPORTS**

On March 2, 2017, the Magistrate Judge issued Findings and Recommendations to summarily dismiss the petition for failure to exhaust state remedies. (Doc. No. 6.) The Findings and Recommendations were served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. Over twenty-one days passed and no party filed objections. On March 27, 2017, the Court adopted the Findings and Recommendations, dismissed the petition, closed the case, and entered judgment. (Docs. No. 7-8.) On that same date, the Court received a purported motion for extension of time to file objections. (Doc. No. 9.) The Court vacated the order dismissing the petition and granted Petitioner an extension of time to file objections.

On April 14, 2017, Petitioner filed objections. Upon review of the objections, the Court

1 will decline to adopt the Findings and Recommendation and will order a stay of the proceedings
2 pending exhaustion of state remedies.

3 In his objections, Petitioner concedes that he has not exhausted Grounds 1-4, 6, and 8-10
4 of the petition in the state courts. The only grounds for relief presented in the petition are those
5 same enumerated grounds for relief. Therefore, the instant petition is completely unexhausted.
6 Conceding that his petition is at least partially unexhausted, Petitioner requests a stay of the
7 proceedings under Rhines v. Weber, 544 U.S. 269 (2005) and Pace v. DiGuglielmo, 544 U.S. 408
8 (2005).

9 Recently, the Ninth Circuit held that a district court has discretion to hold a completely
10 unexhausted federal petition in abeyance pending exhaustion of state remedies. Mena v. Long,
11 813 F.3d 907, 910 (9th Cir. 2016). Pursuant to Rhines, a district court may hold a petition in
12 abeyance when “the petitioner had good cause for his failure to exhaust, his unexhausted claims
13 are potentially meritorious, and there is no indication that the petitioner engaged in intentionally
14 dilatory litigation tactics.” Rhines, 544 U.S. at 278. In this case, Petitioner states he is uncertain
15 if his unexhausted claims will be untimely once the state courts address them. In light of this
16 uncertainty, he has filed the instant “protective” petition. In Pace, the Supreme Court
17 contemplated the filing of a protective petition in such a case. Pace, 544 U.S. at 416. Further, the
18 Court noted that “[a] petitioner's reasonable confusion about whether a state filing would be
19 timely will ordinarily constitute ‘good cause’ for him to file in federal court.” Id. (citing Rhines,
20 544 U.S. at 278). Therefore, Petitioner has shown good cause for a stay of his petition. Although
21 the Court is not prepared at this time to make an assessment of the merits of the claims, a
22 preliminary review of the claims indicates that Petitioner alleges constitutional violations that, if
23 true, would entitle him to habeas relief. In addition, it appears that no prejudice would inure to
24 the parties by granting the requested stay. Also, there is no indication that Petitioner has engaged
25 in intentionally dilatory litigation tactics.

26 Therefore, the Court will grant Petitioner’s motion for a stay of the proceedings and will
27 hold the petition for writ of habeas corpus in abeyance pending exhaustion of Petitioner’s state
28 remedies.

1 However, the Court will not indefinitely hold the petition in abeyance. See Calderon v.
2 U.S. Dist. Court for Northern Dist. of California (Taylor), 134 F.3d 981, 988 n. 11 (9th Cir.
3 1998). No later than thirty (30) days after the date of service of this order Petitioner must inform
4 the Court of the status of the habeas proceedings in state court, including the dates his cases were
5 filed, the case numbers, and any outcomes. Further, Petitioner must proceed diligently to pursue
6 his state court remedies, and every sixty (60) days after the filing of the initial status report
7 Petitioner must file a new status report regarding the status of his state court habeas corpus
8 proceedings. Following final action by the state courts, Petitioner will be allowed thirty (30) days
9 within which to file a motion for leave to amend the instant petition to include the newly
10 exhausted claims. Failure to comply with these instructions and time allowances will result in
11 this Court vacating the stay *nunc pro tunc* to the date of this order. Kelly v. Small, 315 F.3d
12 1063, 1071 (9th Cir. 2003).

13 **ORDER**

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. The Court DECLINES to adopt the Findings and Recommendations issued on
16 March 2, 2017;
- 17 2. Petitioner’s motion to stay the instant proceedings on his habeas petition (Doc.
18 1), is GRANTED;
- 19 3. Proceedings on the instant petition are STAYED pending exhaustion of
20 Petitioner’s state remedies concerning the unexhausted claims presented in his
21 petition (Doc. No. 1);
- 22 4. Petitioner is DIRECTED to file a status report within thirty (30) days of the
23 date of service of this order, advising the Court of the status of all pending
24 habeas proceedings filed in state court, the dates when such cases were filed,
25 and any outcomes;
- 26 5. Petitioner is DIRECTED to file a new status report every sixty (60) days after
27 the filing of the initial status report; and
- 28 6. Petitioner is GRANTED thirty (30) days following the final order of the state

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courts within which to file a motion for leave to amend the petition to include
the newly exhausted claims.

IT IS SO ORDERED.

Dated: April 18, 2017

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE