

1 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
2 exhaustion doctrine is based on comity to the state court and gives the state court the initial
3 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
4 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion
5 requirement by providing the highest state court with a full and fair opportunity to consider each claim
6 before presenting it to the federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995).

7 Petitioner raises two claims in his petition. He concedes that ground two has not been
8 presented to the state courts and is unexhausted. Because the claim has not been presented to the
9 highest state court, it is subject to dismissal. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
10 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).

11 **II. Motion for Stay and Abeyance**

12 **A. Legal Standard**

13 Traditionally, a district court has had the discretion to stay a petition which it may validly
14 consider on the merits. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 987-988 (9th Cir.
15 1998); Greenawalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir.), *cert. denied*, 519 U.S. 1102
16 (1997). However, the Ninth Circuit has held that Taylor in no way granted "district courts carte
17 blanche to stay even fully exhausted habeas petitions." Taylor, 134 F.3d at 988 n. 11. Granting a stay
18 is appropriate where there is no intention on the part of the Petitioner to delay or harass and in order to
19 avoid piecemeal litigation. Id. In addition, the Ninth Circuit has indicated that it is proper for a district
20 court, in its discretion, to hold a petition containing only exhausted claims in abeyance in order to
21 permit the petitioner to return to state court to exhaust his state remedies. Kelly v. Small, 315 F.3d
22 1063, 1070 (9th Cir. 2004); Ford v. Hubbard, 305 F.3d 875, 882-883 (9th Cir. 2002); James v. Pliler,
23 269 F.3d 1124, 1126-1127 (9th Cir. 2002); Taylor, 134 F.3d 981.

24 Two procedures are available to a habeas petitioner who wishes to stay a pending federal
25 petition while exhausting claims in state court: the Rhines procedure and the Kelly procedure.
26 See Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005). The appropriate procedure in a particular case
27 depends on whether the petition is "mixed" or fully exhausted. See id.

28 Under Rhines, 544 U.S. 269, a district court has discretion to stay a mixed or wholly

1 unexhausted petition to allow a petitioner time to present his or her unexhausted claims to state
2 courts. Id. at 276; see Mena v. Long, 813 F.3d 907, 912 (9th Cir. 2016) (holding a district court has the
3 discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth
4 in Rhines). This stay and abeyance procedure is called a "Rhines stay" and is available only when: (1)
5 there is "good cause" for the failure to exhaust; (2) each unexhausted claim is not "plainly meritless;"
6 and (3) the petitioner did not intentionally engage in dilatory litigation tactics. Rhines, 544 U.S. at
7 277-78.

8 Under Kelly, 315 F.3d 1063, the district court may stay a petition's exhausted claims to allow
9 the petitioner time to exhaust unexhausted claims in state court. Kelly, 315 F.3d at 1070-71. Unlike
10 a Rhines stay, a Kelly stay "does not require that a petitioner show good cause for his failure to
11 exhaust state court remedies." King v. Ryan, 564 F.3d 1133, 1135. A Kelly stay involves a three-step
12 procedure: "(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays
13 and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity to
14 proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his petition and
15 re-attaches the newly-exhausted claims to the original petition." Id. (citing Kelly, 315 F.3d at 1070-
16 71). Thus, while "Rhines allows a district court to stay a mixed petition, and does not require that
17 unexhausted claims be dismissed while the petitioner attempts to exhaust them . . . Kelly allows the
18 stay of fully exhausted petitions, requiring that any unexhausted claims be dismissed." Id. at 1139-
19 40 (emphasis in original) (citing Jackson, 425 F.3d at 661).

20 **B. Discussion**

21 Petitioner alleges that ineffective assistance of trial counsel and appellate counsel is the basis
22 for the claim Petitioner seeks permission to exhaust in the state courts, and argues that there is good
23 cause under Rhines to grant the stay. (Doc. 15 at 5; Doc. 19 at 2-13.)

24 **1. Good Cause**

25 The Ninth Circuit has stated that "a reasonable excuse, supported by evidence to justify a
26 petitioner's failure to exhaust," will demonstrate good cause under Rhines. Blake v. Baker, 745 F.3d
27 977, 982 (9th Cir. 2014). In Blake, the Ninth Circuit held that ineffective assistance of counsel by
28 post-conviction counsel can be good cause for a Rhines stay, however, bare allegations of state post-

1 conviction ineffective assistance of counsel do not suffice. Id. at 983. The Blake court concluded that
2 petitioner satisfied the good cause standard where he argued that his postconviction counsel "failed to
3 conduct any independent investigation or retain experts in order to discover the facts underlying his
4 trial-counsel IAC claim; namely, evidence that Blake was subjected to outrageous and severe sexual,
5 physical and emotional abuse as a child, and suffered from organic brain damage and psychological
6 disorders." 745 F.3d at 982 (internal quotation marks omitted). The petitioner supported this argument
7 with extensive evidence, including psychological evaluation reports, a declaration by the private
8 investigator who worked briefly for his post-conviction attorney, and thirteen declarations from
9 petitioner's family and friends describing his "abhorrent" childhood conditions. Id. at 982-83.
10 The Blake court concluded that the petitioner had met the standard to show good cause
11 under Rhines. Id. at 983-84 & n.7.

12 "There is little authority on what constitutes good cause to excuse a petitioner's failure to
13 exhaust" under Rhines. Blake, 745 F.3d at 980. "The Supreme Court has addressed the issue only
14 once, when it noted that a 'petitioner's reasonable confusion about whether a state filing would be
15 timely will ordinarily constitute 'good cause' for him to file in federal court.'" Id. (quoting Pace v.
16 DiGuglielmo, 544 U.S. 408, 416 (2005)). The Ninth Circuit has "held that good cause
17 under Rhines does not require a showing of 'extraordinary circumstances,' but that a petitioner must do
18 more than simply assert that he was 'under the impression' that his claim was exhausted." Dixon v.
19 Baker, 847 F.3d 714, 720 (9th Cir. 2017) (quoting Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir.
20 2005); and Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008)). "While a bald assertion cannot
21 amount to a showing of good cause, a reasonable excuse, supported by evidence to justify a
22 petitioner's failure to exhaust, will." Blake, 745 F.3d at 982.

23 Respondent argues that Petitioner fails to explain why he did not raise his claim of appellate
24 counsel ineffectiveness when he had the opportunity to do so on state habeas. (Doc. 18 at 2-3.)
25 Petitioner alleges that he had counsel on his post-conviction direct appeal and did not have counsel for
26 the three post-appeal habeas corpus proceedings he filed in the superior court, the Court of Appeal and
27 the California Supreme Court. (Doc. 19 at 5.)

28 In Dixon, the petitioner filed collateral challenges in state court without the assistance of

1 counsel and failed to exhaust all of his claims. The Ninth Circuit held that, "[i]f the petitioner was
2 without state post-conviction counsel entirely . . . the only evidence available concerning good cause
3 would . . . be the easily proven assertion that the petitioner was without counsel in those
4 proceedings." Dixon, 847 F.3d at 721. The Ninth Circuit went on to find that, "[a] petitioner who is
5 without counsel in state post-conviction proceedings cannot be expected to understand the technical
6 requirements of exhaustion and should not be denied the opportunity to exhaust a potentially
7 meritorious claim simply because he lacked counsel." Id.

8 As Petitioner contends, under Dixon, lack of counsel at a stage of post-conviction proceedings
9 supports a finding of good cause with respect to that stage of proceedings. (Doc. 19 at 5.) Petitioner
10 has met the Rhines good cause standard.

11 **2. Merit of Claim**

12 Under the second prong of the Rhines test, a district court would abuse its discretion if it were
13 to grant a petitioner a stay when his claims are plainly "meritless." Rhines, 544 U.S. at 277. Petitioner
14 has not merely made a bare assertion of ineffective assistance of counsel. Petitioner developed the
15 ineffective assistance of counsel argument and has raised it in a habeas corpus petition filed in the
16 Court of Appeal, Fifth Appellate District on September 28, 2020 (after the filing of the instant motion
17 and before the filing of Petitioner's reply). Petitioner included as an attachment the habeas corpus
18 petition filed and now pending in the Court of Appeal, which Petitioner contends demonstrates that
19 there is established case law supporting both the deficient performance and prejudice aspects of
20 ineffective assistance of counsel claims with respect to both trial counsel and appellate counsel. (Doc.
21 19 at 6.) Specifically, Petitioner alleges ineffective assistance of trial counsel for failing to object to,
22 and to seek to redact, prejudicial and inadmissible comments a law enforcement officer made
23 concerning Petitioner's guilt and credibility during his pretrial interrogation of Petitioner. (Doc. 19-1
24 at 14-36.) Petitioner further argues that the failure of Petitioner's appellate attorney to raise the issue
25 of ineffective assistance of counsel deprived Petitioner of his right to the effective assistance of
26 appellate counsel. (Doc. 19-1 at 36-39.) Accordingly, Petitioner has provided sufficient evidentiary
27 support demonstrating that his unexhausted claim is potentially meritorious.

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3. Absence of Dilatory Tactics

Under the third prong of the Rhines test, "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if . . . there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Rhines, 544 U.S. at 278. Petitioner asserts that he failed to raise the issue of ineffective assistance of appellate counsel because he was unaware of it, and he did not fail to raise it for purposes of delay. (Doc. 15 at 6; Doc. 19 at 14.) There is no evidence that Petitioner has engaged in dilatory litigation tactics to date. Petitioner satisfies the third prong of Rhines.

The Court will not indefinitely hold the petition in abeyance. Rhines, 544 U.S. at 277. Petitioner must diligently pursue his state court remedies. He is directed to file a status report within 60 days of the date of service of this Order, and he must file a status report every 60 days thereafter advising the Court of the status of the state court proceedings. Following final action by the state courts, Petitioner will be allowed 30 days to file a motion to lift the stay. 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, and dismissal of the unexhausted claims. Rhines, 544 U.S. at 278.

ORDER

Accordingly, the Court ORDERS:

- 1) Petitioner’s motion for a Rhines stay (Doc. 15) is GRANTED;
- 2) Petitioner is DIRECTED to file a status report within 60 days of the date of service of this Order, and then every 60 days thereafter; and
- 3) Following final order of the state courts, Petitioner is DIRECTED to file a motion to lift the stay within 30 days.

IT IS SO ORDERED.

Dated: November 24, 2020

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE