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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JEFFREY GERALD JONES,

2:97-CV-2167-MCE-CMK

Petitioner,

DEATH PENALTY CASE

vs.

FINDINGS AND RECOMMENDATIONS

RON DAVIS,

Respondent.

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Petitioner, a state prisoner proceeding with appointed counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner’s motion (Doc. 125) for an order staying this case and holding further proceedings in abeyance pending resolution of a third state court exhaustion petition.

Petitioner seeks to raise three new claims in state court. In Claim A of the proposed third exhaustion petition, petitioner argues that relief is available because the prosecution’s expert, Dr. Arthur Lamb, has now repudiated his prior opinion expressed at trial that petitioner was malingering. In Claim B, petitioner seeks to introduce new evidence to the state court in the form of the prosecutor’s trial notes which suggest that peremptory challenges were improperly used to exclude jurors based on race. In Claim C, petitioner relies on a recent

1 district court decision out of the Central District of California in Jones v. Chappell, 31 F. Supp.
2 3d 1050 (C.D. Ca. 2014), holding that systemic delays in the resolution of capital cases in
3 California violate the Eighth Amendment.

4 When a stay-and-abeyance motion is filed, there are two approaches for analyzing
5 the motion, depending on whether the petition is mixed or fully exhausted. See Jackson v. Roe,
6 425 F.3d 654, 661 (9th Cir. 2005). If the petitioner seeks a stay-and-abeyance order as to a
7 mixed petition containing both exhausted and unexhausted claims, the request is analyzed under
8 the standard announced by the Supreme Court in Rhines v. Weber, 544 U.S. 269 (2005). See
9 Jackson, 425 F.3d at 661. If, however, the petition currently on file is fully exhausted, and what
10 petitioner seeks is a stay-and-abeyance order to exhaust claims not raised in the current federal
11 petition, the approach set out in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on
12 other grounds by Robbins, 481 F.3d 1143, applies. See Jackson, 425 F.3d at 661.

13 Under Rhines, as a threshold condition for this court to exercise its discretion to
14 issue a stay-and-abeyance order as to mixed petitions, the court must determine that there was
15 good cause for failing to exhaust claims before raising them in the federal case. See Rhines v.
16 Weber, 544 U.S. at 277. If there is good cause for petitioner's failure to exhaust, it may be an
17 abuse of discretion to deny stay and abeyance where there is no indication of intentional dilatory
18 litigation tactics. See id. at 278. Stay and abeyance is not appropriate where the unexhausted
19 claim is plainly meritless. See id. at 277. If a stay-and-abeyance order is issued with respect to a
20 mixed petition, the district court may employ a three-step procedure which involves: (1) the
21 dismissal of unexhausted claims from the original petition; (2) a stay of the remaining claims
22 pending exhaustion; and (3) amendment of the original petition to add newly exhausted claims
23 that then relate back to the original petition. See Calderon v. United States Dist. Ct. (Taylor),
24 134 F.3d 981, 986-88 (9th Cir. 1998).

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1 Under Kelly, the district court is required to “. . . consider the option of holding
2 the exhausted petition in abeyance so that the petitioner would be able to exhaust his claims in
3 state court before attempting to amend his federal petition to include the newly exhausted
4 claims.” Jackson, 425 F.3d at 661 (citing Kelly, 315 F.3d at 1070). Whether to exercise this
5 option is within the discretion of the district court. See Kelly, 315 F.3d at 1070. However, the
6 Ninth Circuit has recognized the “. . . clear appropriateness of a stay when valid claims would
7 otherwise be forfeited.” Id. Moreover, a stay under such circumstances promotes comity by
8 deferring the exercise of federal jurisdiction until after the state court has ruled. See id.

9 Turning to the three claims petitioner seeks to raise in state court, this court finds
10 that, under Rhines, petitioner has not shown good cause. Alternatively, under Kelly, the court
11 finds that a discretionary stay is not appropriate.

12 As to Claim A, a stay is not warranted because petitioner has not shown diligence.
13 Specifically, the claim is based on Dr. Lamb’s March 18, 2015, declaration but petitioner has not
14 explained why that declaration could not have been obtained sooner. As respondent observes,
15 even though California law only recently changed to explicitly recognize a repudiated expert
16 opinion as “false evidence” warranting relief under California Penal Code § 1473, petitioner
17 could have nonetheless contacted Dr. Lamb much sooner to discuss his opinion. Section 1473
18 was amended in 1975 to allow relief based on false evidence and, until the California Supreme
19 Court’s decision in In re Richards, 55 Cal. 4th 948 (2012), holding that expert opinion is not
20 evidence in and of itself subject to § 1473, petitioner could have contacted Dr. Lamb.¹ Petitioner
21 has not explained why, despite his long-standing mental problems, he did not contact Dr. Lamb
22 prior to 2012.

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25 ¹ In response to In re Richards, § 1473 was amended, effective January 1, 2015 to
26 explicitly recognize that “false evidence” includes expert opinions that have been repudiated by
the expert originally providing the opinion.

1 As to Claim B, petitioner asserts that he has new evidence in the form of the
2 prosecutor's notes only obtained from the Sacramento County District Attorney's Office in 2008
3 through informal discovery. However, as respondent notes, petitioner initially sought an
4 informal exchange of discovery from the Sacramento County District Attorney's Office in 2000
5 but the request was declined due to lack of good cause. Petitioner has not explained what, if
6 anything, he did between 2000 and 2008 to attempt to establish good cause sufficient for the
7 informal exchange or to attempt to obtain the documents through formal discovery and court
8 order.

9 As to Claim C, a stay is not warranted because the claim is meritless on federal
10 habeas review and because petitioner has not shown diligence. The claim is meritless because it
11 is not cognizable. Federal habeas relief is available only based on the state court's
12 misapplication of rules clearly announced by the United States Supreme Court. Here, the delay
13 claim is based on a district court decision and not on any rule announced by the Supreme Court
14 made retroactive on collateral review. Furthermore, petitioner has not been diligent in presenting
15 this claim. While the Central District decision was not issued until 2014, petitioner's case has
16 been pending for nearly 30 years. Thus, the delay in resolving his case was apparent long before
17 the Central District's decision. As respondent observes, no Supreme Court authority provides
18 that ". . . a petitioner can store a claim in reserve until the day it is favorably received by a federal
19 court in another case."

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1 Based on the foregoing, the undersigned recommends that petitioner motion (Doc.
2 125) be denied.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court. Responses to objections shall be filed within 14 days after service of
7 objections. Failure to file objections within the specified time may waive the right to appeal.
8 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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10 DATED: September 8, 2015

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12 **CRAIG M. KELLISON**
13 UNITED STATES MAGISTRATE JUDGE
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