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

GEORGE EDWARD COLES,

Petitioner,

No. CIV S-08-2134 LKK DAD P

vs.

D.K. SISTO, Warden,

ORDER AND

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 2007 judgment of conviction entered in the Sacramento County Superior Court. Pending before the court is petitioner’s motion for a stay and abeyance.<sup>1</sup>

**PROCEDURAL HISTORY**

On September 11, 2008, petitioner commenced this action by filing a petition for writ of habeas corpus raising the following three claims:

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<sup>1</sup> Petitioner has filed two identical motions for a stay and abeyance. Petitioner filed his first motion in response to findings and recommendations issued by the court. He filed his second motion in response the assigned district judge’s order adopting those findings and recommendations. Under the circumstances of this case, the court will disregard petitioner’s earlier-filed motion as duplicative and moot and proceed on petitioner’s motion filed July 20, 2009.

1 Ground one: Petitioner was denied his Sixth Amendment right of  
2 confrontation, due process of law, and a fair trial by the  
introduction of prejudicial hearsay testimony.

3 Ground two: Petitioner contends his guaranteed right under the  
4 Sixth Amendment to the United States Constitution was severely  
abridged . . . [and that he was denied effective assistance of  
5 counsel during sentencing].

6 Ground three: Petitioner contends the punishment imposed violates  
7 the Eighth Amendment's proscription against cruel and unusual  
punishment under the United States Constitution.

8 (Pet. at 5-6.)

9 On November 13, 2008, the court ordered respondent to file a response to the  
10 petition. Respondent filed a motion to dismiss, arguing that petitioner failed to exhaust the  
11 second and third claims in his federal petition. Petitioner filed an opposition to the motion,  
12 arguing that he had exhausted state court remedies. Specifically, petitioner explained that the  
13 State of California filed an information against him and his co-defendant Roosevelt Leon Cathey  
14 and that their trial court and direct appeal case numbers were the same. On direct appeal, Mr.  
15 Cathey argued to the California Supreme Court that he had received ineffective assistance of  
16 counsel and that his right to be free from cruel and unusual punishment under the Eighth  
17 Amendment had been violated. Petitioner argued that he should not have to re-exhaust these  
18 claims. In the alternative, petitioner argued that if the court found that he still needed to exhaust  
19 the second and third claims set forth in his federal petition, the court should construe his petition  
20 as a "mixed" petition and grant him a stay and abeyance.

21 On April 23, 2009, the undersigned issued findings and recommendations on  
22 respondent's motion to dismiss, finding that petitioner had failed to exhaust the second and third  
23 claims presented in his federal petition. Although petitioner's co-defendant may have raised  
24 claims on direct appeal that were similar to the second and third claims of petitioner's federal  
25 petition, petitioner's co-defendant's fair presentation of these claims had no bearing on  
26 petitioner's need to satisfy the exhaustion requirement. However, the undersigned determined

1 that respondent's motion to dismiss should nonetheless not be granted. Instead, the undersigned  
2 recommended that petitioner be given an opportunity to seek a stay and abeyance to allow him to  
3 return to state court to exhaust his unexhausted claims.

4 On June 30, 2009, the assigned district judge in this case adopted the findings and  
5 recommendations and ordered petitioner to file a motion for a stay abeyance. Petitioner has since  
6 filed a motion for a stay and abeyance. Respondent has not filed an opposition or otherwise  
7 responded to the motion.

#### 8 **PETITIONER'S MOTION FOR A STAY AND ABEYANCE**

9 In his motion, petitioner explains that he mistakenly filed a "mixed" petition in  
10 this court. As described above, he believed that his co-defendant's fair presentation of the  
11 second and third claims in his federal petition would be sufficient to satisfy the exhaustion  
12 requirement in his case. Petitioner accurately notes that he will be unable to proceed in this  
13 action on his second and third claims until he exhausts state court remedies, so he requests a stay  
14 and abeyance.

#### 15 **DISCUSSION**

16 The United States Supreme Court has affirmed the district court's discretion to  
17 stay a federal habeas proceeding to allow a petitioner to present unexhausted claims to the state  
18 court where there is good cause for the petitioner's failure to exhaust all claims in state court  
19 before filing a federal habeas petition. See Rhines v. Weber, 544 U.S. 269 (2005). See also  
20 King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) (analyzing the two procedures available to habeas  
21 petitioners who wish to proceed with exhausted and unexhausted claims for relief); Anthony v.  
22 Cambra, 236 F.3d 568, 575 (9th Cir. 2000) (authorizing district courts to stay fully exhausted  
23 federal petitions pending exhaustion of other claims); Calderon v. United States Dist.Court  
24 (Taylor), 134 F.3d 981, 987-88 (9th Cir. 1998). This discretion to issue a stay extends to  
25 "mixed" petitions. Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) ("Rhines concluded that a  
26 district court has discretion to stay a mixed petition to allow a petitioner time to return to state

1 court to present unexhausted claims.”). The Supreme Court cautioned, however, that “stay and  
2 abeyance should be available only in limited circumstances” and that a stay “is only appropriate  
3 when the district court determines there is good cause for the petitioner’s failure to exhaust his  
4 claims first in state court.” Rhines, 544 U.S. at 277. Even if a petitioner shows good cause, the  
5 district court should not grant a stay if the unexhausted claims are plainly meritless. Id. Finally,  
6 federal proceedings may not be stayed indefinitely, and reasonable time limits must be imposed  
7 on a petitioner’s return to state court to exhaust additional claims. Id. at 277-78.

8               In this case, petitioner cannot present the second and third claims in his federal  
9 petition or any other new claims to this court until those claims have been fairly presented to the  
10 California Supreme Court. It does not appear that the pro se petitioner seeks to stay these  
11 proceedings for an improper purpose. Nor does it appear that petitioner has engaged in abusive  
12 litigation tactics or intentional delay. Moreover, if petitioner obtains relief in state court, his  
13 federal petition may be rendered moot, thereby serving the interests of judicial economy as well  
14 as the interests of justice. Accordingly, good cause appearing, petitioner’s motion for a stay and  
15 abeyance should be granted.

#### 16   **OTHER MATTERS**

17               Also pending before the court is petitioner’s motion for appointment of counsel.  
18 Petitioner is advised that there currently exists no absolute right to appointment of counsel in  
19 habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18  
20 U.S.C. § 3006A authorizes the appointment of counsel at any stage of the case “if the interests of  
21 justice so require.” See Rule 8(c), Fed. R. Governing § 2254 Cases. In the present case, the  
22 court does not find that the interests of justice would be served by the appointment of counsel at  
23 the present time.

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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that:

3 1. Petitioner’s May 7, 2009 motion for appointment of counsel (Doc. No. 16) is  
4 denied; and

5 2. Petitioner’s May 12, 2009 motion for a stay and abeyance (Doc. No. 17) is  
6 disregarded as duplicative and moot.

7 IT IS HEREBY RECOMMENDED that:

8 1. Petitioner’s July 20, 2009 motion for a stay and abeyance (Doc. No. 19) be  
9 granted;

10 2. Petitioner be ordered to present all unexhausted claims to the California  
11 Supreme Court in a further state habeas corpus petition to be filed within thirty days;

12 3. This action be stayed and the Clerk of the Court be directed to administratively  
13 close the case;

14 4. Petitioner be ordered to file and serve a status report in this case on the first  
15 court day of each month; and

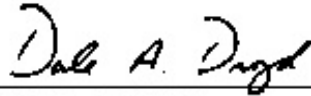
16 5. Petitioner be ordered to file and serve a motion to lift the stay of this action,  
17 along with a proposed amended petition containing only exhausted claims, within thirty days  
18 after petitioner is served with the California Supreme Court’s order disposing of the state  
19 exhaustion petition.

20 These findings and recommendations are submitted to the United States District  
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
22 days after being served with these findings and recommendations, any party may file written  
23 objections with the court and serve a copy on all parties. Such a document should be captioned  
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
25 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 24, 2009.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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