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

TRACY A. JOHNSON,

Petitioner,

No. CIV S-09-1396 LKK DAD P

vs.

DERRAL G. ADAMS, Warden,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis. Petitioner has also filed a motion for a stay and abeyance.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

BACKGROUND

On May 20, 2009, petitioner commenced this action by filing a petition for writ of habeas corpus, challenging his 2002 judgment of conviction entered in the Sacramento County Superior Court. Petitioner claims that he exhausted all of his claims on direct appeal. However, on the last page of his petition, petitioner requests a stay and abeyance to return to the California

1 Supreme Court to re-litigate his second claim. In that claim, petitioner contends that the trial
2 court improperly admitted into evidence police officers' testimony regarding his alleged
3 involvement in prior incidents of domestic violence. Petitioner claims that admission of the
4 officers' testimony violated his rights under the Sixth Amendment Confrontation Clause.
5 Petitioner argues that a stay and abeyance is necessary so that he can re-litigate this claim in light
6 of the United States Supreme Court recent decision Giles v. California, __ U.S. __, 128 S. Ct.
7 2678 (2008). (Pet. & Supp.)

8 DISCUSSION

9 Petitioner is advised that a stay and abeyance procedure is available to petitioners
10 who need to exhaust their claims in state court. See Rhines v. Weber, 544 U.S. 269 (2005)
11 (affirming district court discretion to stay a federal habeas proceeding to allow a petitioner to
12 present unexhausted claims to the state court where there is good cause for the petitioner's failure
13 to exhaust all claims in state court before filing a federal habeas petition); King v. Ryan, 564
14 F.3d 1133 (9th Cir. 2009) (analyzing the two procedures available to habeas petitioners who wish
15 to proceed with exhausted and unexhausted claims for relief).

16 According to petitioner, he has already litigated his second claim on direct appeal
17 before the California Supreme Court. Specifically, he sought "to resolve questions as to what
18 constitutes 'testimonial' statements to the police under the Sixth Amendment, and to clarify the
19 scope of the doctrine of forfeiture by wrongdoing." (Pet. at 4A.) Where, as here, petitioner has
20 fairly presented a claim to the California Supreme Court, he has exhausted his state court
21 remedies with regards to that claim. See Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton
22 v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986). Petitioner is advised that he is not required to re-
23 litigate a claim in state court each time he believes a development in caselaw bolsters his case. If
24 this court reaches the merits of petitioner's claims, the court will consider all relevant caselaw.
25 Accordingly, the court will recommend denying petitioner's motion for a stay and abeyance. If

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1 these findings and recommendations are adopted by the assigned district judge, the court will
2 then issue an order requiring respondent to file and serve a response to petitioner's petition.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that petitioner's May 20, 2009 motion to proceed in
5 forma pauperis (Doc. No. 2) is granted.

6 IT IS HEREBY RECOMMENDED that petitioner's motion for a stay and
7 abeyance (Doc. No. 1) be denied.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
10 days after being served with these findings and recommendations, petitioner may file written
11 objections with the court. The document should be captioned "Objections to Magistrate Judge's
12 Findings and Recommendations." Petitioner is advised that failure to file objections within the
13 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
14 F.2d 1153 (9th Cir. 1991).

15 DATED: August 24, 2009.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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