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

ROBERT LAUCELLA,

Petitioner,

No. 2:09-cv-2871 JFM (HC)

vs.

JOHN W. HAVILAND,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se and paid the filing fee. This action was transferred to the instant court on October 13, 2009. On October 2, 2009, petitioner filed a motion for stay and abeyance. Petitioner contends that grounds one through nine are fully exhausted, but that the February 25, 2009 order of the California Supreme Court denied his petition without prejudice to filing a petition for writ of habeas corpus in the trial court. (Pet’s Ex. V, citing See In Re Lawrence, 44 Cal.4th 1181 (2008)). Petitioner seeks leave to return to state court to exhaust his claims in ground ten, pursuant to In Re Lawrence.

In Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (2005), the United States Supreme Court held that a district court has authority to stay a mixed petition pending exhaustion of unexhausted claims in “limited circumstances,” i.e., “when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court.” Id. at 1535. The Court also held that it would be an abuse of discretion to stay federal habeas corpus proceedings pending exhaustion of a “plainly meritless” claim. Id.

Petitioner has demonstrated good cause for his failure to exhaust his tenth claim in state court. See Rhines, 544 U.S. at 278. In re Lawrence was decided long after petitioner was

1 convicted. The California Supreme Court suggested petitioner return to state court with this
2 claim. There is no indication that petitioner has engaged in intentional dilatory tactics, and his
3 underlying claim is potentially meritorious. Thus, petitioner's motion should be granted.

4 Accordingly, IT IS ORDERED that the Clerk of the Court is directed to assign a
5 district judge to this case; and

6 IT IS HEREBY RECOMMENDED that:

- 7 1. Petitioner's October 2, 2009 motion to stay be granted;
- 8 2. This action be stayed pending exhaustion of state remedies as to petitioner's
9 tenth claim; and
- 10 3. Petitioner be directed to file a motion to lift the stay within thirty days from the
11 date of any order by the California Supreme Court resolving the claim referred to in paragraph 2
12 of this recommendation.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
18 shall be served and filed within ten days after service of the objections. The parties are advised
19 that failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: October 26, 2009.

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24 UNITED STATES MAGISTRATE JUDGE