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

CHARLES CHONG THAO,

Petitioner,

No. CIV S-09-3536 DAD P

vs.

WARDEN SWARTHOUTH,

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. In accordance with the court’s December 31, 2009 order, petitioner has paid the filing fee.

PRELIMINARY SCREENING

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. . . .” Rule 4, Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus at several stages of a case, including “summary dismissal under Rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the

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1 answer and petition are considered; or a dismissal after consideration of the pleadings and an
2 expanded record.”

3 **BACKGROUND**

4 On December 22, 2009, petitioner commenced this action by filing a petition for
5 writ of habeas corpus, challenging his 2007 judgment of conviction for robbery and kidnapping
6 entered by the Sacramento County Superior Court. In his petition, petitioner raises several
7 claims of ineffective assistance of counsel as well as a claim of actual innocence. According to
8 the petition, petitioner appealed his conviction to the California Court of Appeal for the Third
9 Appellate District and the California Supreme Court. However, it appears that he did not raise
10 any of the claims set forth in his pending federal petition on appeal or in any subsequent petitions
11 for post-conviction relief to the California Supreme Court. (Pet. at 2, 5 & Supp.)

12 Recognizing that this court cannot grant relief on unexhausted claims, petitioner
13 has filed a motion for a stay and abeyance. Therein, he argues that he has diligently pursued his
14 claims, that his claims have merit, and that his motion for a stay and abeyance is not for purposes
15 of delay or abuse of the process. In this regard, petitioner maintains that he has demonstrated
16 good cause for a stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005). (Pet’r’s Mot.
17 for Stay & Abey. at 1-5.)

18 **ANALYSIS**

19 The exhaustion of state court remedies is a prerequisite to the granting of a
20 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must
21 be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion,
22 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
23 providing the highest state court with a full and fair opportunity to consider all claims before

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25 ¹ A petition may be denied on the merits without exhaustion of state court remedies. 28
26 U.S.C. § 2254(b)(2).

1 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
2 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

3 In this case, it appears that petitioner has not presented any of the claims pending
4 in his federal petition to the California Supreme Court. Although petitioner has filed a motion
5 for a stay and abeyance in order to exhaust his claims in state court, petitioner is advised that a
6 stay and abeyance is not available where, as here, the petition is wholly unexhausted. See
7 Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). In Raspberry, the Ninth Circuit
8 explained:

9 District courts have the discretion to hold a mixed petition in
10 abeyance pending exhaustion of the unexhausted claims. We
11 decline to extend that rule to the situation where the original
12 habeas petition contained only unexhausted claims Once a
13 district court determines that a habeas petition contains only
14 unexhausted claims, it need not inquire further as to petitioner's
15 intentions. Instead, it may simply dismiss the habeas petition for
16 failure to exhaust.

14 Id. at 1154. See also, e.g., Dotson v. Uribe, No. CV 09-6115-FMC (PLA), 2009 WL 4885200, at
15 *4 (C.D. Cal. Dec. 14, 2009) (denying a motion for a stay and abeyance because the federal
16 petition contained only unexhausted claims); Brown v. Dexter, No. CV 08-1119-SGL (VBK),
17 2008 WL 4384181, at *4 (C.D. Cal. Aug. 21, 2008) (same).

18 Here, the court is not presented with a mixed petition. Rather, it appears that the
19 instant petition contains only unexhausted claims. Accordingly, the court concludes that
20 petitioner's motion for a stay and abeyance should be denied, and this action should be dismissed
21 without prejudice due to petitioner's failure to exhaust state court remedies.

22 CONCLUSION

23 IT IS HEREBY ORDERED that:

24 1. The Clerk of the Court is directed to randomly assign a United States District
25 Judge to this action; and

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1 2. The Clerk of the Court is directed to serve a copy of these findings and
2 recommendations together with a copy of the petition filed in the instant case on the Attorney
3 General of the State of California.

4 IT IS HEREBY RECOMMENDED that:

5 1. Petitioner's December 22, 2009 petition for writ of habeas corpus (Doc. No. 1)
6 be dismissed for failure to exhaust state remedies;

7 2. Petitioner's December 22, 2009 motion for a stay and abeyance (Doc. No. 4)
8 be denied; and

9 3. This action be closed.

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

17 DATED: January 29, 2010.

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20 _____
21 DALE A. DROZD
22 UNITED STATES MAGISTRATE JUDGE

20 DAD:9
21 thao3536.103