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

LOUIS VOTINO,

Petitioner,

No. 2:10-cv-1784-FCD-JFM (HC)

vs.

MICHAEL MARTEL,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 13, 2010, this court directed respondent to file an answer to the petition within forty-five days from the date of that order. On August 23, 2010, petitioner filed a motion to stay this action pending exhaustion of state court remedies with on a claim of actual innocence based on newly discovered evidence. On August 26, 2010, the parties were served with a notice setting a briefing schedule on petitioner’s motion. Pursuant to that notice, respondent’s opposition to petitioner’s motion was due on September 16, 2010. On September 9, 2010, respondent filed a motion for an extension of time to file an answer in light of petitioner’s motion for stay and abeyance. The time for filing an opposition to petitioner’s motion has expired and respondent has not opposed the motion.

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1           In Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (2005), the United States  
2 Supreme Court held that a district court has authority to stay a petition for writ of habeas corpus  
3 pending exhaustion of unexhausted claims in “limited circumstances,” i.e., “when the district  
4 court determines there was good cause for the petitioner’s failure to exhaust his claims first in  
5 state court.” Id. at 1535. Petitioner’s unexhausted claim is based on evidence discovered by  
6 petitioner in July 2010, and petitioner filed his claim in state court in August 2010. This court  
7 finds that petitioner had good cause for failing to exhaust that claim prior to filing the instant  
8 action. Accordingly, the court will recommend that petitioner’s motion for stay and abeyance be  
9 granted.

10           In light of this recommendation, respondent’s motion for an extension of time to  
11 file an answer will be granted. Respondent’s obligation to file an answer is deferred until further  
12 order of court.

13           In accordance with the above, IT IS HEREBY ORDERED that:

- 14           1. Respondent’s September 9, 2010 motion for an extension of time is granted;  
15           2. Respondent’s obligation to file an answer is deferred until further order of  
16 court; and

17           IT IS HEREBY RECOMMENDED that

- 18           1. Petitioner’s August 23, 2010 motion for stay and abeyance be granted;  
19           2. This action be stayed pending exhaustion of state remedies as to petitioner’s  
20 claim of newly discovered evidence of actual innocence  
21           3. Petitioner be directed to file a motion to lift the stay within thirty days from the  
22 date of any order by the California Supreme Court resolving the claim referred to in paragraph 2  
23 of this recommendation; and  
24           4. The Clerk of the Court be directed to administrative close this action.

25           These findings and recommendations are submitted to the United States District  
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen

1 days after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Such a document should be captioned  
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
4 objections shall be filed and served within fourteen days after service of the objections. The  
5 parties are advised that failure to file objections within the specified time may waive the right to  
6 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 DATED:September 23, 2010.

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10 UNITED STATES MAGISTRATE JUDGE

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