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

PHARAOH E. BROOKS,

Petitioner,

No. CIV S-11-1637 MCE DAD P

vs.

M. MCDONALD, Warden,

Respondent.

ORDER

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Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**BACKGROUND**

On June 16, 2011, petitioner commenced this action by filing a petition for writ of habeas corpus, challenging his 2008 judgment of conviction entered in the San Joaquin County Superior Court, together with a motion for a stay and abeyance. Petitioner represented that he had filed a “mixed” petition with this court and claimed that he had good cause for a stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005).

On August 2, 2011, the court issued findings and recommendations, recommending that petitioner’s motion for a stay and abeyance be denied. According to petitioner’s form petition, he presented the six claims which he characterized as “unexhausted”



1 Dist.Court (Taylor), 134 F.3d 981, 987-88 (9th Cir. 1998). This discretion to issue a stay extends  
2 to “mixed” petitions. Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines concluded that  
3 a district court has discretion to stay a mixed petition to allow a petitioner time to return to state  
4 court to present unexhausted claims.”). The Supreme Court has cautioned, however, that “stay  
5 and abeyance should be available only in limited circumstances” and that a stay “is only  
6 appropriate when the district court determines there is good cause for the petitioner’s failure to  
7 exhaust his claims first in state court.” Rhines, 544 U.S. at 277. Even if a petitioner shows good  
8 cause, the district court should not grant a stay if the unexhausted claims are plainly meritless.  
9 Id. Finally, federal proceedings may not be stayed indefinitely, and reasonable time limits must  
10 be imposed on a petitioner’s return to state court to exhaust additional claims. Id. at 277-78.

11 Here, petitioner included the ineffective assistance of counsel claim that he now  
12 wishes to exhaust in his original federal habeas petition. In this regard, the petition pending  
13 before the court is a “mixed” petition. Under the Rhines procedure outlined by the Supreme  
14 Court, this court has discretion to stay a “mixed” petition to allow a petitioner time to return to  
15 state court to present his unexhausted claim. However, based on the information petitioner has  
16 provided to the court in his objections, it is not clear that the granting of a stay and abeyance is  
17 appropriate in this case. Specifically, petitioner has not provided sufficient facts and information  
18 to satisfy the requirements of Rhines. For example, the court is unable to determine whether  
19 petitioner had good cause for not exhausting all of his claims before filing this federal habeas  
20 action, whether petitioner’s unexhausted claim is potentially meritorious, or whether petitioner  
21 has been diligent in pursuing his unexhausted claim.

22 In the interest of justice, the court will grant petitioner additional time to file a  
23 renewed motion for a stay and abeyance. Petitioner is advised that any renewed motion must (1)  
24 show good cause for petitioner’s failure to exhaust his ineffective assistance of counsel claim  
25 before filing this action, (2) demonstrate why his unexhausted claim is potentially meritorious,

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1 (3) describe the status of any state court proceedings on the unexhausted claim, and (4)  
2 demonstrate that petitioner has acted diligently in pursuing his unexhausted claim.

3 **CONCLUSION**

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

- 5 1. The court's August 2, 2011 findings and recommendations are vacated;  
6 2. Petitioner's motion for a stay and abeyance (Doc. No. 2) is denied as moot; and  
7 3. Petitioner is granted thirty days from the date of this order in which to file a  
8 renewed motion for a stay and abeyance addressing the issues set forth above.

9 DATED: August 23, 2011.

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12 DALE A. DROZD  
13 UNITED STATES MAGISTRATE JUDGE

12 DAD:9  
13 broo1637.vac