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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 DAD P

vs.

M. MCDONALD, 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 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. Petitioner represents that he has filed a “mixed” petition with this court. Specifically, petitioner claims that six of his eight habeas claims are unexhausted. Petitioner

1 contends that he has good cause for a stay and abeyance under Rhines v. Weber, 544 U.S. 269,  
2 277 (2005). He also contends that his claims are potentially meritorious and that he is not using  
3 the requested stay as a dilatory tactic. Petitioner maintains that he has been diligently  
4 investigating and pursuing all of his claims. (Pet. at 2 & Mot. for Stay & Abey. at 1-2).

5 **DISCUSSION**

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

13 According to petitioner’s form petition, he presented six claims which he  
14 characterizes as “unexhausted” on direct appeal to both the California Court of Appeal and the  
15 California Supreme Court. Petitioner is advised that where, as here, he has fairly presented his  
16 claims to the California Court of Appeal and the California Supreme Court on direct appeal, he  
17 has exhausted his state court remedies with regard to those claims. See Picard v. Connor, 404  
18 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986). Petitioner is not  
19 required to re-litigate his claims in state habeas corpus proceedings to satisfy the federal  
20 exhaustion requirement. Accordingly, under these circumstances, the court will recommend that  
21 petitioner’s motion for a stay and abeyance be denied.<sup>1</sup> If these findings and recommendations

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24 <sup>1</sup> If the court has somehow misunderstood petitioner’s form habeas application and motion  
25 for a stay and abeyance, he should file objections to these findings and recommendations and clarify  
26 why he believes he has not exhausted all of his claims by presenting them to the California Supreme  
Court. As noted above, based on petitioner’s submissions to the court, it appears that he exhausted  
the six claims about which he is concerned on direct appeal through his petition for review filed with  
the California Supreme Court.

1 are adopted by the assigned district judge, the court will then issue an order requiring respondent  
2 to file and serve a response to petitioner's petition for writ of habeas corpus.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that:

- 5 1. Petitioner's motion to proceed in forma pauperis (Doc. No. 6) is granted; and  
6 2. The Clerk of the Court is directed to randomly assign a United States District  
7 Judge to this action.

8 IT IS HEREBY RECOMMENDED that:

- 9 1. Petitioner's motion for a stay and abeyance (Doc. No. 2) be denied; and  
10 2. This matter be referred back to the undersigned for further proceedings on  
11 petitioner's original petition for writ of habeas corpus.

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

19 DATED: August 1, 2011.

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23 DALE A. DROZD  
24 UNITED STATES MAGISTRATE JUDGE

22 DAD:9  
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