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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RACARDO JACKSON,
Petitioner,
v.
WARDEN OF CALIFORNIA STATE
PRISON, SOLANO,
Respondent.

No. 2:14-cv-2268 MCE DAD P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding through counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 26, 2015, this matter came before the court on petitioner’s motion for a stay and abeyance. For the reasons stated below, the undersigned will recommend that petitioner’s motion for a stay and abeyance be denied.

BACKGROUND

On August 26, 2010, petitioner was convicted of second-degree murder with a firearm enhancement in the Solano County Superior Court. As a result, petitioner was sentenced to 55 years to life in state prison. (Pet. at 1.)

On June 16, 2011, petitioner filed a writ of mandate in the California Court of Appeal, which that court denied. The California Supreme Court denied review. On March 19, 2013, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, which that

1 court also denied. On June 19, 2013, the California Court of Appeal affirmed petitioner's
2 judgment of conviction on direct review. On September 11, 2013, the California Supreme Court
3 denied review. (Pet'r's Mot. for Sty. & Abey. at 2.)

4 In his federal habeas corpus petition, petitioner claims that his constitutional rights were
5 violated at his trial as a result of: (1) juror misconduct; (2) prejudicial exclusion of the victim's
6 prior violence; (3) prejudicial admission of Officer Shaffer's testimony; (4) error under Doyle v.
7 Ohio; (5) prosecutorial misconduct; and (6) cumulative error under Chapman v. California. (Pet.
8 & Statement of Grounds/Brief in Support.) The parties do not dispute that all but a sub-claim of
9 petitioner's second claim for relief are unexhausted.

10 DISCUSSION

11 In petitioner's motion for a stay and abeyance, counsel for petitioner seeks a stay of this
12 action under Rhines v. Weber, 544 U.S. 269 (2005). Specifically, petitioner contends that "the
13 ineffective assistance of his counsel for the Writ of Habeas Corpus filed on March 19, 2013 and
14 the direct appeal give good cause for the court to stay the Habeas petition and allow Petitioner to
15 return to state court to fully exhaust his claims." (Pet'r's Mot. for Sty. & Abey. at 4.)

16 Petitioner has fallen far short of showing the requisite "good cause" for a stay of this
17 action. See Blake v. Baker, 745 F.3d 977 (9th Cir. 2014). In Blake, a habeas petitioner had filed
18 a motion for a stay and abeyance under Rhines to exhaust an ineffective assistance of counsel
19 claim based on his trial counsel's alleged failure to discover and present evidence of petitioner's
20 abusive upbringing and history of mental illness. Id. at 979. Petitioner argued that he had good
21 cause for failing to exhaust the ineffective assistance claim because he had received ineffective
22 assistance of counsel during his state post-conviction proceedings. Id. Specifically, petitioner
23 argued that his state post-conviction counsel failed to discover the same evidence of abuse and
24 mental illness underlying his ineffective assistance of trial counsel claim. Id.

25 In that context, the Ninth Circuit held:

26 The good cause element is the equitable component of the Rhines
27 test. It ensures that a stay and abeyance is available only to those
28 petitioners who have a legitimate reason for failing to exhaust a
claim in state court. As such, good cause turns on whether the
petitioner can set forth a reasonable excuse, supported by sufficient

1 evidence, to justify that failure. An assertion of good cause without
2 evidentiary support will not typically amount to a reasonable excuse
justifying a petitioner’s failure to exhaust.

3 Blake, 745 F.3d at 982.

4 The Ninth Circuit determined that the petitioner in Blake had submitted sufficient
5 evidence to support his argument that he received ineffective assistance of counsel during his
6 state post-conviction proceedings. Blake, 745 F.3d at 982-83. Specifically, petitioner’s federal
7 post-conviction counsel had compiled evidence of petitioner’s abusive upbringing and history of
8 mental illness, including a declaration from a private investigator and thirteen declarations from
9 petitioner’s family and friends. Id. The Ninth Circuit concluded that the district court had abused
10 its discretion when it found that petitioner had failed to establish good cause because petitioner’s
11 showing “was not a bare allegation of state post-conviction IAC, but a concrete and reasonable
12 excuse, supported by evidence that his state post-conviction counsel failed to discover,
13 investigate, and present to the state courts the reasonably available evidence of Blake’s
14 upbringing and compromised mental condition.” Id. at 983.

15 In this case, petitioner has not established “good cause” for failing to exhaust his claims
16 prior to presenting them in federal court. Petitioner has not submitted any evidence in support of
17 his contention that he received ineffective assistance of counsel on direct appeal or during his
18 state post-conviction proceedings. As the Ninth Circuit made clear in Blake, a “bald assertion”
19 does not amount to a showing of good cause. Blake, 745 F.3d at 982. Compare Noguera v.
20 California, No. 2:14-cv-1045 GGH P, 2014 WL 5473548 at *2 (E.D. Cal. Oct. 23, 2014)
21 (“petitioner has failed to demonstrate that he qualifies for a stay because he has failed to support
22 his request as required in Blake (i.e., there is no documentation – as opposed to oral assertions –
23 showing that he discussed these claims with trial and/or appellate counsel and was ignored”);
24 Lisea v. Sherman, No. 2:14-cv-1766 CKD P, 2014 WL 4418632 at *3 (E.D. Cal. Sept. 8, 2014)
25 (denying a motion for a stay and abeyance because the petitioner supplied no evidence in support
26 of his contention that appellate counsel was ineffective for failing to raise certain claims); Davis
27 v. Biter, No. 12-cv-3001 BEN (BLM), 2014 WL 2894975 at *8 (S.D. Cal. June 25, 2014)
28 (denying a motion for a stay and abeyance because the petitioner had not presented any evidence

1 to support his good cause argument), with Cruz v. Mitchell, No. 13-cv-02792 JST, 2015 WL
2 78779 at *3 (N.D. Cal Jan. 5, 2015) (petitioner’s showing of ineffective assistance of counsel met
3 the good cause requirement because he supported his argument with juror questionnaires,
4 declarations from prior counsel, and trial transcripts); Ramos v. Chappell, No. C 05-3752 SI,
5 2014 WL 6065660 at *3 (N.D. Cal. Nov. 12, 2014) (petitioner established good cause by
6 advancing a reasonable excuse, supported by evidence – including a declaration from his post-
7 conviction counsel who admitted that it was not a strategic choice to fail to attempt to contact trial
8 counsel, obtain independent psychological evaluator, and so on – to justify his failure to exhaust).

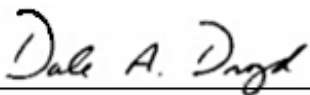
9 **CONCLUSION**

10 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion for a stay and
11 abeyance (Doc. No. 13) be denied.¹

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

20 Dated: July 24, 2015

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23 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

24 ¹ Prior to the hearing on this motion for stay and abeyance, petitioner’s counsel indicated that he
25 intended to move to withdraw and to seek appointment of counsel on petitioner’s behalf. (ECF
26 No. 18.) At the hearing on the motion for stay and abeyance, the undersigned directed counsel
27 for petitioner to file that motion immediately. Nonetheless, counsel for petitioner has still not
28 done so. Counsel for petitioner is now directed to file his motion to withdraw within seven days
of the service of this order. As indicated at the June 26, 2014, hearing the undersigned is
inclined, though somewhat reluctantly for the reasons expressed on the record, to grant such a
motion and to appoint counsel on behalf of petitioner.