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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERMAINE BARKLEY,
Petitioner,
v.
JOE LIZARRAGA,
Respondent.

No. 2:15-cv-0655 AC P

ORDER

Petitioner is a state prisoner at Mule Creek State Prison (MCSP) who proceeds pro se and in forma pauperis with a First Amended Petition (FAP) for writ of habeas corpus pursuant to 28 U.S.C. § 2254, ECF No. 14, and an amended motion to stay this action pursuant to Rhines v. Weber, 544 U.S. 269 (2005), ECF No. 15. Plaintiff has consented to the jurisdiction of the undersigned Magistrate Judge for all purposes pursuant to 28 U.S.C. § 636(c) and Local Rule 305(a). See ECF No. 4.

Under certain conditions, a district court may stay a “mixed petition” (containing both exhausted and unexhausted claims) while petitioner returns to state court to exhaust his unexhausted claims. See Rhines, 544 U.S. at 277-78; see also King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009). A stay under Rhines is appropriate only when petitioner has demonstrated good cause for failing to previously exhaust his claims, and is not available if the unexhausted claims are “plainly meritless” or petitioner has engaged in “abusive litigation tactics or intentional

1 delay.” Rhines, 544 U.S. at 277-78.

2 Pending is petitioner’s fourth stay request. The current request, together with the FAP,
3 conform to the requirements set forth in the court’s prior orders, see ECF Nos. 3, 8, 11, and
4 warrant a stay of this action while petitioner exhausts his additional claims in the state courts.
5 The FAP contains the following ten claims, only the first of which have been exhausted:¹

6 Claim One: Denial of petitioner’s right to fully confront and cross-
7 examine the complaining witness.

8 Claim Two: Ineffective assistance of trial counsel (IATC) based on
9 his failure to request that the jury be instructed on the law relating
10 to voluntary intoxication.

11 Claim Three: Failure of prosecution to disclose potentially
12 exculpatory evidence, specifically, a photo taken, and text messages
13 written, by the complaining witness.

14 Claim Four: IATC based on counsel’s failure to adequately explain
15 to petitioner the rejected plea offer and the possible consequences
16 of proceeding to trial.

17 Claim Five: IATC based on counsel’s failure to investigate
18 “extremely vital discovery” and present it at trial, including the
19 comparison of two gun holsters; obtaining DNA testing of blood;
20 and obtaining the testimony of witness I. Martines.

21 Claim Six: IATC based on counsel’s failure to impeach the
22 testimony of the complaining witness and Detective Williams.

23 Claim Seven: IATC based on counsel’s failure to object to the
24 introduction of the following “hearsay evidence:” an unsupported
25 statement by the prosecution in closing argument concerning the
26 number of brown blankets; the prosecution’s unsupported statement
27 on rebuttal that a photo of the couches showed blood; the
28 prosecution’s introduction of a photo at trial of a trash can that
allegedly contained bloody clothes involved in the alleged crime,
despite the absence of any evidence (e.g. DNA testing of blood)
linking the clothes to the crime; the prosecution’s closing statement
that petitioner told the complaining witness to “sit” (rather than
“get”) on the bed.

Claim Eight: IATC based on counsel’s failure to present “crucial
impeachment evidence” against the complaining witness
concerning her use of alcohol and plaintiff’s residence.

Claim Nine: IATC based on counsel’s failure to present the
testimony of the following potential witnesses: P. Tracy, who

¹ While several of petitioner’s claims are “compound,” the court anticipates their refinement through exhaustion in the state courts.

1 provided a statement that the complaining witness recanted her
2 accusations against petitioner; D. Bickle, concerning petitioner's
3 residence; and expert medical witnesses on petitioner's behalf to
rebut the testimony of the state's medical witnesses concerning the
alleged rape and injuries.

4 Claim Ten: IATC based on counsel's failure to obtain a
5 continuance of trial for the purpose of obtaining the testimony of
6 witness I. Martines to impeach the testimony of the complaining
witness.

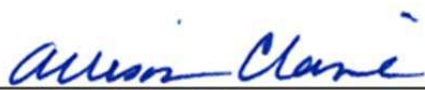
7 As stated in his FAP, and set forth in his previous motions to stay, petitioner was
8 previously unable to exhaust Claims Three through Ten because unable to obtain a paper copy of
9 his case file from trial counsel. See ECF Nos. 1, 7, 10. In his current motion to stay, petitioner
10 demonstrates that he recently obtained the assistance of the Shasta County Public Defender to
11 obtain a paper copy of his case file and make arrangements with the MCSP Litigation
12 Coordinator to permit petitioner to view photographs and listen to electronic recordings. See ECF
13 No. 15 at 25.

14 The court finds that petitioner has demonstrated good cause for failing to previously
15 exhaust Claims Three through Ten in state court, and has not engaged in "abusive litigation
16 tactics" or "intentional delay" in this action. Rhines, 544 U.S. at 277-78. The court further finds
17 that petitioner's unexhausted claims are not "plainly meritless." Id.

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Petitioner's amended motion to stay this action, ECF No. 15, is granted pursuant to
20 Rhines v. Weber, 544 U.S. 269 (2005), pending exhaustion of petitioner's Claims Three through
21 Ten in the state courts.
- 22 2. Petitioner is directed to inform this court, and file a request to lift the stay, within thirty
23 (30) days after a decision by the California Supreme Court concluding state habeas review on
24 petitioner's additional claims.
- 25 3. The Clerk of Court is directed to administratively close this case pending exhaustion.

26 DATED: October 21, 2015

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28 ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE