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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNELL D. JOHNSON,  
Petitioner,  
v.  
ERIC ARNOLD,  
Respondent.

No. 2:15-cv-1635-EFB P

ORDER

Petitioner is a state prisoner proceeding without counsel on a petition writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup> He has filed a motion for stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to “to add an ineffective assistance claim against his appellate and trial counsel . . . .” ECF No. 18 at 1. Respondent opposes the motion. ECF No. 22. For the reasons that follow, the motion is denied.

A district court may not grant a petition for a writ of habeas corpus unless the petitioner has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). Where a federal habeas petitioner has failed to exhaust a claim in the state courts, he may ask the federal court to stay its consideration of his petition while he returns to state court to complete exhaustion. Under *Rhines*, a district court may stay a “mixed” petition in its entirety, without requiring dismissal of the

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<sup>1</sup> This proceeding was referred to the assigned magistrate judge by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1) and is before the undersigned pursuant to the parties’ consent. E.D. Cal. Local Rules, Appx. A, at (k).

1 unexhausted claims while the petitioner attempts to exhaust them in state court.<sup>2</sup> *King v. Ryan*,  
2 564 F.3d 1133, 1139-40 (9th Cir. 2009). *Rhines* requires that the petitioner show good cause for  
3 failing to exhaust the claims in state court prior to filing the federal petition. *Rhines*, 544 U.S. at  
4 277-78; *King*, 564 F.3d at 1139. A *Rhines* stay is inappropriate where the unexhausted claims are  
5 “plainly meritless” or where the petitioner has engaged in “abusive litigation tactics or intentional  
6 delay.” *Id.* Here, a *Rhines* stay is unavailable because (1) the petition contains three fully  
7 exhausted claims, and is therefore not “mixed,” *see* ECF Nos. 1 & 22 at 3, and (2) petitioner’s  
8 motion fails to demonstrate good cause for his failure to exhaust his ineffective assistance of  
9 counsel claims. The motion to stay must therefore be denied.<sup>3</sup>

10 Accordingly, it is hereby ORDERED that the motion to stay (ECF No. 18) is denied  
11 without prejudice.

12 Dated: September 26, 2016.

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14 EDMUND F. BRENNAN  
15 UNITED STATES MAGISTRATE JUDGE

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<sup>2</sup> “Mixed” petitions contain both exhausted and unexhausted claims.

25 <sup>3</sup> The court notes that under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002), a district court  
26 may stay a petition containing only exhausted claims while allowing the petitioner to proceed to  
27 state court to exhaust additional claims. *King*, 564 F.3d at 1135. If the newly exhausted claims  
28 are not time-barred, the petitioner may amend his petition to add them to the pending petition.  
*See id.* at 1140-41. However, if the newly exhausted claims would be time-barred, amendment  
would be futile and a stay would be inappropriate.