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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY D. JOHN,

 Petitioner,

 v.

DAVID LONG,

 Respondent.

No. 2:16-cv-1218 AC P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis and a motion for stay and abeyance. Petitioner 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). ECF No. 7.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. ECF No. 2. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).


The petition indicates, and the motion for stay and abeyance confirms, that the petition is fully unexhausted. ECF No. 1 at 3; ECF No. 3. The Ninth Circuit recently held that a petitioner may seek a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005), to preserve the filing date of his federal petition, even when the petition contains only unexhausted claims. Mena v. Long, 813

1 F.3d 907, 912 (9th Cir. 2016). In order to obtain a stay under Rhines, petitioner must show that
2 (1) good cause exists for his failure to have first exhausted the claims in state court, (2) the claim
3 or claims at issue potentially have merit, and (3) there has been no indication that petitioner has
4 intentionally delayed pursuing the litigation. Rhines, 544 U.S. at 277-78. Petitioner's motion for
5 stay and abeyance does not address these three factors. ECF No. 3. The motion for stay will
6 therefore be denied and petitioner will be given an opportunity to file a motion for stay that
7 addresses each of the three Rhines factors. If petitioner fails to file a motion for stay, or if he files
8 a motion for stay and it does not address the three Rhines factors, the case will proceed on the
9 petition as is. If the petition proceeds on the unexhausted claims, it will be subject to dismissal as
10 unexhausted unless the state expressly waives the exhaustion requirement and it is likely that the
11 petition will ultimately be dismissed. Petitioner is advised that he does not require an order from
12 this court in order to initiate any state court proceedings necessary to exhaust his administrative
13 remedies.

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Petitioner's motion to proceed in forma pauperis (ECF No. 2) is granted.
- 16 2. Petitioner's motion for stay and abeyance (ECF No. 3) is denied without prejudice.
- 17 3. Petitioner shall have thirty days from the service of this order to file a motion for stay
18 and abeyance that shows that (1) good cause exists for his failure to exhaust his claims in state
19 court before filing them in this court, (2) the claim or claims at issue potentially have merit, and
20 (3) he has not intentionally delayed pursuing the litigation. Failure to address all three factors, or
21 failure to file a motion for stay, will result in the case proceeding on the unexhausted petition and
22 will likely result in dismissal of this case.

23 DATED: November 30, 2016

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25 ALLISON CLAIRE
26 UNITED STATES MAGISTRATE JUDGE
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