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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOWARD FORBES,

 Petitioner,

 v.

L. ELDRIGDE,

 Respondent.

No. 2:16-cv-01884 MCE GGH P

FINDINGS & RECOMMENDATIONS

Pending before the court is petitioner’s motion to stay proceedings pursuant to Rhines v. Weber, 544 U.S. 269 (2005). ECF No. 51. Petitioner seeks to exhaust his state court remedies on a claim alleging due process violation based on his denied right to testify at trial. Id. Respondent has filed an opposition. ECF No. 52. Petitioner has filed a reply. ECF No. 55.

A district court may properly stay a habeas petition and hold it in abeyance pursuant to Rhines v. Weber, 544 U.S. 269 (2005). See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009). Under Rhines, a district court may stay a mixed petition to allow a petitioner to present an unexhausted claim to the state courts. Rhines, 544 U.S. at 277. Assuming the petition itself has been timely filed, such a stay “eliminates entirely any limitations issue with regard to the originally unexhausted claims, as the claims remain pending in federal court[.]” King, 564 F.3d at 1140. However, to qualify for a stay under Rhines, a petitioner must: (1) show good cause for his failure to exhaust all his claims before filing this action; (2) explain and demonstrate how his

1 unexhausted claim is potentially meritorious; (3) describe the status of any pending state court
2 proceedings on his unexhausted claim; and (4) explain how he has diligently pursued his
3 unexhausted claim. Rhines, 544 U.S. at 277–78. What constitutes good cause has not been
4 precisely defined except to indicate at the outer end that petitioner must not have engaged in
5 purposeful dilatory tactics, Rhines, 544 U.S. at 277-78, and that “extraordinary circumstances”
6 need not be found. Jackson v. Roe, 425 F.3d 654, 661-662 (9th Cir. 2005); see also Rhines, 544
7 U.S. at 279 (Stevens, J., concurring) (the “good cause” requirement should not be read “to impose
8 the sort of strict and inflexible requirement that would trap the unwary pro se prisoner”) (internal
9 citation omitted); id. (Souter, J., concurring) (pro se habeas petitioners do not come well trained
10 to address tricky exhaustion determinations). “But as the Jackson court recognized, we must
11 interpret whether a petitioner has “good cause” for a failure to exhaust in light of the Supreme
12 Court’s instruction in Rhines that the district court should only stay mixed petitions in ‘limited
13 circumstances.’ We also must be mindful that AEDPA aims to encourage the finality of sentences
14 and to encourage petitioners to exhaust their claims in state court before filing in federal court.”
15 Wooten v. Kirkland, 540 F.3d 1019, 1023-24 (9th Cir. 2008), quoting Jackson, 425 F.3d at 661)
16 (internal citations omitted).

17 Petitioner contends he has satisfied the requirements set forth by Rhines entitling him to a
18 stay of the proceedings. Petitioner argues he was prevented from raising his claim by his appellate
19 counsel who refused to raise the issue during appeal proceedings. ECF Nos. 51 at 1-2.
20 Nevertheless, petitioner argues his claim is “potentially meritorious to dispute state court fact
21 findings for any presumption of correctness[.]” ECF No. 51 at 2. Petitioner further argues he is a
22 layman in the law and this attempt to raise a new claim is not to intentionally delay proceedings.
23 ECF Nos. 51 at 2; 55 at 2-3. Lastly, petitioner appears to raise his medical condition as another
24 reason for his delay in exhausting his claim. ECF No. 55 at 1-2.

25 Petitioner has not established grounds for a stay under Rhines. The Ninth Circuit has
26 stated that “a reasonable excuse, supported by evidence to justify a petitioner’s failure to
27 exhaust,” will demonstrate good cause under Rhines. Blake v. Baker, 745 F.3d 977, 982 (9th Cir.
28 2014). Here, petitioner has failed to establish good cause for his failure to exhaust his claim.

1 Petitioner first became aware of his claim at trial when he was prevented from testifying. Even
2 assuming petitioner's appellate counsel refused to raise his due process claim, petitioner was free
3 to raise this claim in his state court habeas petitions, as well through his habeas petition in this
4 court. Moreover, this court previously granted petitioner a stay *in January of 2017* to exhaust his
5 state court remedies on his unexhausted claims. See ECF Nos. 6, 12. Petitioner makes no
6 legitimate excuse as to why his "right to testify" claim, which was obviously known to petitioner,
7 was not included in his state exhaustion proceedings after 2017. Petitioner's failure to raise this
8 claim at various points in this action fails to establish neither good cause nor that petitioner was
9 diligent in pursuing his unexhausted claim. Moreover, petitioner's flareups with Multiple Sclerosis
10 in 2015 do not help in establishing that petitioner was diligent in exhausting his claim in 2016,
11 2017, 2018, and 2019. Last of all, mere ignorance of the law fails to establish good cause. See
12 Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008) ("To accept that a petitioner's
13 'impression' that a claim had been included in an appellate brief constitutes 'good cause' would
14 render stay-and-obey orders routine." It would "run afoul of Rhines and its instruction that district
15 courts should only stay mixed petitions in 'limited circumstances.'"); see also Hughes v. Idaho
16 State Board of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (ignorance of the law does not
17 constitute an excuse from due diligence). Based on these reasons, the undersigned recommends
18 denying petitioner's motion to stay the proceedings.

19 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's motion to stay (ECF
20 No. 51) be denied.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
23 after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
26 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: February 4, 2021

4 /s/ Gregory G. Hollows
5 UNITED STATES MAGISTRATE JUDGE
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