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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL RAGAN,
Petitioner,
v.
C. DUCART,
Respondent.

No. 2:17-cv-1924 KJN P

ORDER

I. Introduction

Petitioner, a state prisoner proceeding pro se, 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. Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

Petitioner consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c). Petitioner filed a motion for stay and abeyance of this action under Rhines v. Weber, 544 U.S. 269 (2005) (“Rhines”). (ECF No. 1 at 25.) As set forth below, petitioner’s motion is granted.

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1 II. Petitioner’s Arguments

2 Petitioner concedes that he has not exhausted six claims concerning ineffective assistance
3 of counsel which he alleges are presently pending in the California Court of Appeals for the Third
4 Appellate District. (ECF No. 1 at 14-15; 31.) Petitioner has exhausted his claims that the state
5 court’s finding that petitioner was ineligible for resentencing on counts 6 and 8 was not supported
6 by substantial evidence, and the order denying resentencing violated petitioner’s due process
7 rights. (ECF No. 1 at 13.) Petitioner now seeks to stay his habeas petition while he continues to
8 exhaust his six unexhausted claims. Petitioner states he will file in the California Supreme Court
9 as soon as the state appellate court issues its ruling. Petitioner avers that his delay in raising these
10 claims in state court was due to the ineffective assistance of counsel, who failed to raise the
11 claims on direct appeal.

12 III. Applicable Law

13 A federal district court may not address the merits of a petition for writ of habeas corpus
14 unless the petitioner has exhausted state court remedies with respect to each of his federal claims.
15 Rose v. Lundy, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b)(1). Under Rhines, a district court may
16 stay a mixed petition if the following conditions are met: (1) “the petitioner had good cause for
17 his failure to exhaust,” (2) “his unexhausted claims are potentially meritorious,” and (3) “there is
18 no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Id., 544 U.S.
19 at 278.¹ The Supreme Court made clear that this option “should be available only in limited
20 circumstances.” Id. at 277. Moreover, a stay under Rhines may not be indefinite; reasonable
21 time limits must be imposed on a petitioner’s return to state court. Id. at 277-78.

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23 ¹ A second procedure for staying mixed petitions, known as the “Kelly procedure,” outlined in
24 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), has been described by the Ninth Circuit Court of
25 Appeals to involve the following three-step process: “(1) petitioner amends his petition to delete
26 any unexhausted claims, (2) the court stays and holds in abeyance the amended, fully exhausted
27 petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted
28 claims, and (3) petitioner later amends his petition and re-attaches the newly-exhausted claims to
the original petition.” King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009). The Kelly procedure
is riskier than the Rhines procedure because it does not protect a petitioner’s unexhausted claims
from expiring during a stay and becoming time-barred under the one year statute of limitations.
See King, 564 F.3d at 1140-41.

1 IV. Discussion

2 The instant petition is a “mixed petition,” containing both exhausted and unexhausted
3 claims.²

4 A. Good Cause

5 “The case law concerning what constitutes ‘good cause’ under Rhines has not been
6 developed in great detail.” Dixon v. Baker, 847 F.3d 714, 720 (9th Cir. 2017) (citing Blake v.
7 Baker, 745 F.3d 977, 980 (9th Cir. 2014) (“There is little authority on what constitutes good
8 cause to excuse a petitioner’s failure to exhaust.”)) The Supreme Court has addressed the
9 meaning of good cause only once, stating in dicta that “[a] petitioner’s reasonable confusion
10 about whether a state filing would be timely will ordinarily constitute ‘good cause’” to excuse his
11 failure to exhaust. Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005) (citing Rhines, 544 U.S. at
12 278).

13 The Ninth Circuit has provided limited guidance. Under Ninth Circuit law, the “good
14 cause” test is less stringent than an ‘extraordinary circumstances’ standard. Jackson v. Roe, 425
15 F.3d 654, 661-62 (9th Cir. 2005). However, a petitioner cannot establish good cause simply by
16 alleging that he was “under the impression” that his claim was exhausted. Wooten v. Kirkland,
17 540 F.3d 1019 (9th Cir. 2008). Ineffective assistance of post-conviction counsel can constitute
18 good cause for a Rhines stay. Blake v. Baker, 745 F.3d at 983. The Ninth Circuit concluded that
19 the Rhines standard for cause based on ineffective assistance of counsel “cannot be any more
20 demanding” than the cause standard required to excuse the procedural default of a habeas claim,
21 as set forth in Martinez v. Ryan, 132 S. Ct. 1309 (2012). Blake, 745 F.3d at 983-84. Recently,
22 the Ninth Circuit held that a total absence of post-conviction counsel will constitute good cause.
23 Dixon, 847 F.3d at 721.

24
25 ² Petitioner appears to believe that he raised only exhausted claims in his petition because he
26 states he will seek leave to amend once his unexhausted claims have been exhausted. (ECF No. 1
27 at 29.) However, the form petition contains his unexhausted claims, but in the appended
28 handwritten pages, petitioner clearly sets forth both his exhausted claim, as well as his
unexhausted claims. (ECF No. 1 at 13, 14-15.) Therefore, the instant petition is a mixed petition,
containing all of his claims, and no further amendment is required following state court
exhaustion.

1 Here, petitioner provides a copy of his state habeas petition filed in the California Court of
2 Appeals for the Third District that confirms petitioner is proceeding pro se in his state collateral
3 challenges. Under Dixon, the absence of post-conviction counsel is sufficient to establish good
4 cause for a stay under Rhines. See Dixon, 847 F.3d at 714, 721.

5 B. Potentially Meritorious Claims

6 “A federal habeas petitioner must establish that at least one of his unexhausted claims is
7 not ‘plainly meritless’ in order to obtain a stay under Rhines.” Dixon, 847 F.3d at 722 (quoting
8 Rhines, 544 U.S. at 277). A claim is “plainly meritless” only if “it is perfectly clear that the
9 petitioner has no hope of prevailing.” Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). A
10 petitioner satisfies this showing by presenting a “colorable” claim. Dixon, 847 F.3d at 722; Lucas
11 v. Davis, 2017 WL 1807907, at *9 (S.D. Cal. May 5, 2017) (citing Dixon and using the
12 “‘colorable claim’ standard to analyze whether a claim is ‘plainly meritless.’”).

13 Here, petitioner includes six unexhausted claims. (ECF No. 1 at 14-15.) Some of these
14 unexhausted claims are based on alleged errors in state sentencing and may lack merit.³ But
15 petitioner also alleges that defense counsel failed to investigate or call critical witnesses who
16 would testify as to whether petitioner was armed, depriving petitioner of a crucial defense. (ECF
17 No. 1 at 15.) In view of the limited record before the court at this stage of the proceedings, this
18 court cannot conclude that such claim is plainly without merit. A failure by trial counsel to
19 investigate and present mitigating evidence may constitute ineffective assistance of counsel. See
20 Rompilla v. Beard, 545 U.S. 374, 392-93 (2005); Wiggins v. Smith, 539 U.S. 510, 522-23 (2003);
21 Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999) (“A lawyer who fails to investigate, and to
22 introduce into evidence, information that demonstrates his client’s factual innocence, or that
23 raises sufficient doubts as to that question to undermine confidence in the verdict, renders
24 deficient performance.”). If petitioner can prove such allegations, a court could find that his
25 constitutional rights were violated by ineffective assistance of counsel. Because such ineffective

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27 ³ A misapplication of a state’s sentencing law will violate due process only if the misapplication
28 was arbitrary or fundamentally unfair. See Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994).
“Absent a showing of fundamental unfairness, a state court’s misapplication of its own sentencing
laws does not justify federal habeas relief.” Id.

1 assistance of counsel claim is “colorable,” see Cassett, 406 F.3d at 623-24, and not plainly
2 meritless, this prong of Rhines is satisfied.⁴

3 C. Intentionally Dilatory Tactics

4 Finally, as a third factor to consider, the Supreme Court stated that “if a petitioner engages
5 in abusive litigation tactics or intentional delay, the district court should not grant him a stay at
6 all.” Rhines, 544 U.S. at 278.

7 Here, there is no evidence of intentionally dilatory litigation tactics. Indeed, petitioner has
8 been diligently pursuing his state court remedies even while this action has been pending. This
9 court confirmed that petitioner filed a state habeas petition in the California Court of Appeal for
10 the Third Appellate District, in Case No. C085279.⁵ The petition was denied by the appellate
11 court on August 25, 2017. Id. On September 21, 2017, petitioner filed a new state petition in the
12 California Supreme Court, Case No. S244472. Thus, petitioner is expeditiously exhausting his
13 state court remedies as to the ineffective assistance of counsel claims.

14 V. Conclusion

15 For all of these reasons, petitioner’s motion for stay is granted. While the court grants
16 petitioner’s motion for stay, petitioner is cautioned that he must promptly seek to lift the stay once
17 the California Supreme Court addresses his petition. Rhines, 544 U.S. at 278 (District courts
18 must “place reasonable time limits on a petitioner’s trip to state court and back.”). Thus,
19 petitioner is directed to file a motion to lift the stay in this court, within thirty days from the date
20 the California Supreme Court issues a final order resolving his unexhausted claims.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. Petitioner is granted leave to proceed in forma pauperis;
23 2. Petitioner’s motion for stay and abeyance (ECF No. 1) is granted;

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27 ⁴ The discussion of the potential merit of petitioner’s unexhausted claims is not a determination
of the merits of such claims.

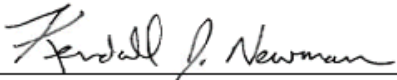
28 ⁵ California Courts, <<http://appellatecases.courtinfo.ca.gov>>, visited October 26, 2017.

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3. Petitioner is directed to file a motion to lift the stay in this court, within thirty days from the date the California Supreme Court issues a final order resolving petitioner's unexhausted claims; and

4. The Clerk of the Court is directed to administratively terminate this action.

Dated: October 30, 2017


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

/raga1924.stay