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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

AJAY KUMAR DEV,  
Petitioner,  
v.  
JOE LIZARRAGA, Warden,  
Respondent.

No. 2:18-cv-1972 AC P

ORDER and  
FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner, a state prisoner proceeding with counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a motion to stay and abey this action pursuant to Rhines v. Weber, 544 U.S. 269 (2005). Petitioner paid the filing fee. This action is referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302(c). For the following reasons, the undersigned recommends that petitioner’s motion for a stay be granted.

II. Background & Statute of Limitations

In 2009, petitioner was convicted in Yolo County Superior Court of sex crimes against his adopted daughter, and sentenced to over 378 years in prison. The Third District California Court of Appeal affirmed the judgment by written order filed January 12, 2017. See People v. Dev, 2017 WL 117536, 2017 Cal. App. Unpub. LEXIS 220 (Cal. Ct. App. Jan. 12, 2017), reh’g denied

1 Feb. 3, 2017. The California Supreme Court denied review on April 19, 2017. See ECF No. 2 at  
2 72.

3 On July 13, 2018, petitioner filed a petition for writ of habeas corpus in the Yolo County  
4 Superior Court (Case No. HCCR 18-29). Four days later, on July 17, 2018, petitioner filed the  
5 instant federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, ECF No. 1,  
6 together with a motion for stay and abeyance, ECF No. 2.

7 The timeliness of the pending federal petition is determined by application of the  
8 Antiterrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2244(d)(1)(A)  
9 (one-year limitations period shall run from “the date on which the judgment became final by the  
10 conclusion of direct review or the expiration of the time for seeking such review”). “Direct  
11 review” includes the ninety-day period during which petitioner could have filed (but did not) a  
12 petition for writ of certiorari in the United States Supreme Court. See Bowen v. Roe, 188 F.3d  
13 1157, 1158-59 (9th Cir. 1999) (“We hold that the period of ‘direct review’ in 28 U.S.C. §  
14 2244(d)(1)(A) includes the period within which a petitioner can file a petition for a writ of  
15 certiorari from the United States Supreme Court, whether or not the petitioner actually files such  
16 a petition.”).

17 Accordingly, petitioner had ninety days following the California Supreme Court’s denial  
18 of direct review on April 19, 2017, or until July 18, 2017, to file a petition for writ of certiorari in  
19 the United States Supreme Court. See Rule 13, Supreme Court Rules. Because petitioner did not  
20 pursue this option, his convictions and sentence became final on July 18, 2017. Bowen, 188 F.3d  
21 at 1157-58. The one-year limitations period commenced the next day, on July 19, 2017. See  
22 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (commencement of limitations period  
23 excludes last day of period for seeking direct review, by application of Fed. R. Civ. P. 6(a)).

24 As a result, absent statutory or equitable tolling, AEDPA’s limitations period expired on  
25 July 18, 2018. Petitioner’s federal petition, filed one day before on July 17, 2018, was thus  
26 timely filed without the benefit of tolling.<sup>1</sup>

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27 <sup>1</sup> Petitioner may be entitled to statutory tolling from July 13, 2018, the date he filed his petition  
28 (continued...)

1 The federal petition contains five claims, two of which were exhausted on direct review,  
2 and three of which are currently pending in state collateral proceedings. The claims that have  
3 been exhausted by presentation to the state courts on direct appeal are Claims Three and Four of  
4 the federal petition:

5 Claim Three: The trial court’s exclusion of translated Nepali court  
6 records, which impeached Sapna’s testimony, violated petitioner’s  
rights to a fair trial and to present a defense.

7 Claim Four: The trial court’s exclusion of email evidence, which  
8 showed Sapna lied at trial, violated petitioner’s rights to a fair trial  
and present a defense.

9 Petitioner’s three unexhausted claims, currently pending in the Yolo County Superior  
10 Court, are identified as follows in the federal petition:

11 Claim One: Trial counsel provided ineffective assistance by failing  
12 to investigate and present eyewitness testimony, expert testimony,  
13 and properly authenticated documentary evidence that impeached  
Sapna’s credibility, failing to present readily available evidence  
14 directly supporting petitioner’s theory of the case and undermining  
the state’s theory.

15 Claim Two: Evidence not presented to the jury demonstrates  
16 petitioner’s actual innocence and provides a permissible ground for  
habeas relief under Herrera v. Collins, 506 U.S. 390 (1993), and  
17 Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (petitioner has  
burden of demonstrating he “is probably innocent” based on his new  
18 evidence, when measured against “the proof of petitioner’s guilt at  
trial”).

19 Claim Five: Cumulative error.

20 Petitioner seeks a stay and abeyance of this action pursuant to Rhines v. Weber, 544 U.S.  
21 269 (2005), so that he may exhaust Claims One, Two, and Five in the state courts.

### 22 III. Legal Standards

23 A Rhines stay permits a prisoner seeking state postconviction relief to avoid expiration of  
24 AEDPA’s one-year statute of limitations while he exhausts additional claims in the state courts  
25 “by filing a ‘protective’ petition in federal court and asking the federal court to stay and abey the

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for writ of habeas corpus in the Yolo County Superior Court. See 28 U.S.C. § 2244(d)(2)  
27 (according statutory tolling for “[t]he time during which a properly filed application for State  
post-conviction or other collateral review with respect to the pertinent judgment or claim is  
28 pending”).

1 federal habeas proceedings until state remedies are exhausted.” Pace v. DiGuglielmo, 544 U.S.  
2 408, 416 (2005) (citing Rhines, 544 U.S. at 278). By preserving the federal filing date, this  
3 process enables a petitioner to timely seek federal relief on all of his claims in a “perfected  
4 petition.” Rhines at 271.

5 Under Rhines, a district court may stay a “mixed” federal habeas petition containing both  
6 exhausted and unexhausted claims upon demonstration of the following “limited circumstances:”  
7 (1) there is “good cause” for petitioner’s failure to previously exhaust her unexhausted claims in  
8 the state courts; (2) the unexhausted claims are potentially meritorious; and (3) petitioner has not  
9 engaged in intentionally dilatory litigation tactics. Rhines at 277-78.

10 IV. Analysis

11 A. “Mixed” Petition

12 The pending federal petition is indeed “mixed,” that is, “a single petition containing some  
13 claims that have been exhausted in the state courts and some that have not.” Rhines at 271.

14 B. Good Cause

15 The “good cause” requirement under Rhines does not require a showing of “extraordinary  
16 circumstances.” Jackson v. Roe, 425 F.3d 654, 662 (9th Cir. 2005). Rather, “[t]he good cause  
17 element is the equitable component of the Rhines test. It ensures that a stay and abeyance is  
18 available only to those petitioners who have a legitimate reason for failing to exhaust a claim in  
19 state court. As such, good cause turns on whether the petitioner can set forth a reasonable excuse,  
20 supported by sufficient evidence, to justify that failure.” Blake v. Baker, 745 F.3d 977, 982 (9th  
21 Cir. 2014) (citing Pace, 544 U.S. at 416).

22 In the present case, petitioner contends that he did not previously exhaust his additional  
23 federal claims because he was awaiting the development of new evidence by current counsel, who  
24 was retained by petitioner’s family in April 2017, after the conclusion of petitioner’s direct  
25 review in the state courts. The new evidence was obtained by petitioner’s counsel through  
26 investigation and witness interviews in Nepal. See ECF No. 2 at 9-10. International investigation  
27 was necessary because petitioner was convicted for sexual crimes against his adopted daughter,  
28 Sapna, who is petitioner’s first cousin and was adopted from Nepal as a teenager by petitioner and

1 his wife. Petitioner has maintained his innocence throughout the underlying proceedings, and  
2 asserts that the new evidence supports his contention that Sapna fabricated the allegations against  
3 him. See ECF No. 1 at 2-7. Petitioner contends that the discovery of relevant new evidence,  
4 commencement of state collateral proceedings before bringing the instant motion to stay, and the  
5 limited time remaining in the federal limitations period, demonstrate good cause warranting a stay  
6 by this court.

7 The undersigned finds these arguments persuasive. Newly discovered evidence weighs in  
8 favor of finding good cause for the failure to earlier exhaust. See Roberts v. Harrison, 2006 WL  
9 705934, at \*1, 2006 U.S. Dist. LEXIS 16115, \*2 (E.D. Cal. Mar. 17, 2006) (newly discovered  
10 evidence in the form of declarations from percipient witnesses). Commencing state collateral  
11 proceedings before seeking a stay in this court also weighs in favor of finding good cause for  
12 granting the stay. See Leonardos v. Buddress, 2007 WL 1174825, at \*3, 2007 U.S. Dist. LEXIS  
13 32411, at \*8-9 (N.D. Cal. Apr. 19, 2007) (this process “decreases the chance of delay and  
14 frustration of the goals of AEDPA to encourage the finality of state court judgements and for  
15 petitioners to litigate claims in state court first”). Additionally, the short time remaining on the  
16 federal limitations period supports a finding of good cause for granting the requested stay. See  
17 Leonardos, 2007 WL 1174825, at \*3, 2007 U.S. Dist. LEXIS 32411, at \*7-8.<sup>2</sup>

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18  
19 <sup>2</sup> As the district court reasoned in Leonardos:

20 Here, the state habeas petition was filed with two days left on the  
21 statute of limitations. A subsequent habeas petition before this Court  
22 will be time-barred if there is any short delay in notification from the  
23 California Supreme Court. Even with careful and diligent lawyering,  
24 a two-day window with notice from the state court notification  
25 system may not be enough time to file the federal habeas petition.  
26 Leonardos supports his position with a case from this district  
27 granting a stay, finding good cause when there was only 12 days left  
28 on the statute of limitations to file a federal habeas petition after the  
state habeas petition was exhausted DeLongis v. Ollison, 2006 U.S.  
Dist. LEXIS 60732, \*3 (N.D. Cal. 2006) (holding that good cause for  
a stay was met because “the window in which he has to file his  
federal petition is extremely narrow -- approximately twelve days --  
and that absent a stay, any small delay in notification to petitioner  
may result in forfeiture of his rights under AEDPA.”)

Leonardos, 2007 WL 1174825, at \*3, 2007 U.S. Dist. LEXIS 32411, at \*7-8.

1 In sum, the undersigned finds that the nearly-expired federal limitations period, protected  
2 by a state collateral proceeding, together with petitioner’s newly discovered evidence, satisfy the  
3 Rhines “good cause” requirement.

4 C. Potential Merit

5 The Ninth Circuit has articulated the following standard for assessing the potential merit  
6 of unexhausted claims in a Rhines motion:

7 A federal habeas petitioner must establish that at least one of his  
8 unexhausted claims is not “plainly meritless” in order to obtain a stay  
9 under Rhines, 544 U.S. at 277. In determining whether a claim is  
10 “plainly meritless,” principles of comity and federalism demand that  
11 the federal court refrain from ruling on the merits of the claim unless  
12 “it is perfectly clear that the petitioner has no hope of prevailing.”  
Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). “A contrary  
rule would deprive state courts of the opportunity to address a  
colorable federal claim in the first instance and grant relief if they  
believe it is warranted.” Id. (citing Rose v. Lundy, 455 U.S. 509, 515  
(1982)).

13 Dixon, 847 F.3d at 722. The undersigned has assessed the potential merit of petitioner’s  
14 unexhausted claims, and finds that at least one of them, petitioner’s ineffective assistance claim  
15 (Claim One), is not “plainly meritless.” Rhines, 544 U.S. at 277.

16 To establish a constitutional violation based on ineffective assistance of counsel, a  
17 petitioner must show (1) that counsel’s representation fell below an objective standard of  
18 reasonableness, and (2) that counsel’s deficient performance prejudiced the defense. Strickland v.  
19 Washington, 466 U.S. 668, 692, 694 (1984). Prejudice exists when “there is a reasonable  
20 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
21 been different.” Strickland, 466 U.S. at 694. A reasonable probability is “a probability sufficient  
22 to undermine confidence in the outcome.” Id.

23 In Claim One, petitioner alleges that trial counsel performed unreasonably and  
24 prejudicially by failing to develop and present crucial credibility-related evidence. Petitioner  
25 emphasizes that the jury’s assessment of his credibility and that of Sapna were central to the case:

26 In defense counsel’s words, there was only “one issue [in the case].  
27 Has [the state] proven beyond a reasonable doubt that Sapna is telling  
28 the truth?” 18 RT 5066. The defense was that Sapna had a motive  
to and did make up the allegations. 18 RT 5117. The prosecutor  
agreed Sapna’s credibility was key; in the prosecutor’s words, “No

1 Sapna, no case.” 18 RT 5015. As the prosecutor correctly noted  
2 during closing arguments, for the jurors to acquit they would have to  
find “Sapna [was] . . . making all this up.” 18 RT 5142.

3 Petition, ECF No. 1 at 79. Petitioner contends that “the jurors deciding whether Sapna was  
4 ‘making this all up’ did not have the full story,” because they heard none of the following  
5 evidence, id. at 79-80:

- 6 • The testimony of Sapna’s firstcousin, Sangita Dev, that in 2004  
7 Sapna admitted making up the allegations because she was upset  
8 about how strict petitioner was as a parent, was afraid of having the  
adoption reversed and wanted to return to the United States. See Ex.  
C, Decl. of Sangita Dev.
- 9 • The testimony of Sapna’s friend Dinesh Deo that Sapna admitted  
10 renewing the charges against petitioner because she was angry with  
11 him and wanted to return to the United States. See Ex. G, Decl. of  
Dinesh Deo.
- 12 • The testimony of headmaster Bhabendra Yadav that Sapna  
13 admitted the allegations against petitioner were not true; she made  
14 them out of anger over how strict a parent petitioner was and she  
renewed the charges because she believed petitioner was behind the  
passport fraud case in Nepal. See Ex. H, Decl. of Bhadendra Yadav.
- 15 • The testimony of Sapna’s friend Ranjana Deo that Sapna was angry  
16 at petitioner because she thought he was behind the passport fraud  
17 case which had been brought against her and that “if she did not  
testify [against petitioner] there would be no way for her to return to  
the United States.” See Ex. I, Decl. of Ranjano Deo.
- 18 • The testimony of Sapna’s friend Shweta Deo that Sapna said she  
19 was “furious” with petitioner when he spoke with her boyfriend who  
20 then broke up with her, made up the allegations in order to find a way  
21 to stay in the United States, felt badly about the false allegations and  
so withdrew them but she later pursued them again because she  
believed petitioner was involved with her Nepali passport fraud case  
and she wanted to return to the United States. See Ex. J, Decl. of  
Shweta Deo.
- 22 • The testimony of a forensic expert that at 8:48 on the morning of  
23 September 26, 2003 – the precise time someone was accessing  
pornography at the petitioner’s home – petitioner was at work  
24 sending an email to his wife who was at her work. See Ex. M, Decl.  
of Michael Mullen.
- 25 • Information about Sapna’s Nepali convictions, and that she had  
26 lied about her birthdate. See Ex. X, Petition for Rehearing; Ex. Y,  
Denial of Rehearing.
- 27 • The accurate translation of the “pretext call’ in which petitioner did  
28 not say, “But you had sex with me when you were 18,” as translated  
by Sapna, but rather, “If that [is] so why did you come with me since

1 18 years?” See Ex. O, Decl. of Netra Daria.

2 • That the prosecutor’s argument petitioner had confessed rape to his  
3 own lawyer was entirely false. See Ex. P, Decl. of Michael  
4 Rothschild.

5 Petitioner’s trial counsel has submitted a declaration averring, inter alia, that the evidence  
6 obtained by current counsel from Sapna’s friends and relatives in Nepal “is entirely consistent  
7 with and furthers the defense I presented at trial that Sapna was not credible. I did not make a  
8 tactical decision not to present this evidence. I was unaware of this evidence at the time of trial  
9 and had I been aware of it, I would have used it.” Ex. P. Decl. of Michael Rothschild, ¶ 14.  
10 Current counsel states that “[t]he same is true with respect to counsel’s failure to properly  
11 authenticate and introduce both the September 26 e-mail and the documents relating to the Nepali  
12 conviction. Both directly support the defense theory that Sapna was lying, albeit in different  
13 ways. . . . The same conclusion is warranted with respect to counsel’s failure to obtain an expert  
14 enhancement of the pretext call.” ECF No. 1 at 83, 84.

15 Petitioner contends that “[t]rial counsel’s failure to present [this] readily available  
16 evidence directly supporting his own theory of the case and just as directly undercutting the  
17 state’s theory” fell below an objective standard of reasonableness. ECF No. 1 at 82. Petitioner  
18 further argues that “defense counsel’s failure to move to reopen the case to correct the  
19 prosecutor’s false argument that petitioner admitted the Bangkok rape to his own lawyer also fell  
20 below an objective standard of care.” Id. at 85. Petitioner specifically pleads prejudice: “Because  
21 all parties recognized Sapna’s credibility was key to the case, counsel’s failure to introduce  
22 evidence showing Sapna lied and undercutting state’s case could have resulted in one or more  
23 jurors finding reasonable doubt and voting to acquit.” Id. at 86.

24 Petitioner’s allegations, which are supported by a substantial proffer of exculpatory  
25 evidence that was not presented at trial, establish a colorable claim of ineffective assistance of  
26 trial counsel under Strickland, 466 U.S. at 692, 694. Petitioner’s unexhausted Claim One is not  
27 “plainly meritless.” Rhines, 544 U.S. at 277; see also Dixon, 847 F.3d at 722 (unexhausted claim  
28 has “claim plausibility” if it is not “plainly meritless”). Accordingly, this factor weighs in favor  
of a stay. See Rhines at 278.



1                   D.     Delay

2                   Finally, the Supreme Court has cautioned that “if a petitioner engages in abusive litigation  
3 tactics or intentional delay, the district court should not grant him a stay at all.” Rhines, 544 U.S.  
4 at 278. This court must therefore consider whether petitioner engaged in abusive litigation tactics  
5 or intentional delay before filing his state petition for collateral review and the instant federal  
6 petition.

7                   Petitioner’s family retained current counsel, Cliff Gardner, in April 2017. Gardner has  
8 filed a declaration explaining that he completed his review of the nearly 10,000-page trial record  
9 in late August or September 2017, and met with petitioner in October 2017. Gardner Decl., ECF  
10 No. 2 at 97 ¶ 2. In early November petitioner elected to pursue state and federal habeas  
11 proceedings. Id. at ¶ 3. Counsel avers that he “commenced investigating the case and have  
12 prepared petitioner’s state and federal petitions within weeks of completing that investigation and  
13 learning the legal and factual bases for all the claims. A substantial portion of that investigation  
14 involved investigation and interviews in Nepal, since that is where the complaining witnesses in  
15 the case spent a great deal of time. Based on new evidence developed during the investigation,  
16 petitioner’s state-court petition was filed on July 13, 2018.” Id. at 97-8, ¶ 3.

17                   This chronology reflects reasonable diligence. There was no delay between the  
18 conclusion of direct review and plaintiff’s retention of habeas counsel, and no appearance of  
19 delay by counsel in commencing and pursuing the necessary case review and investigation.  
20 Counsel’s timeline is entirely reasonable in light of the size of the record and the need to conduct  
21 interviews in Nepal. The undersigned finds no evidence of intentional delay or abusive litigation  
22 tactics. Petitioner’s diligence in pursuing his claims supports a stay.

23                   V.     Summary

24                   For the reasons explained above, the undersigned finds that petitioner has satisfied the  
25 requirements for stay and abeyance under Rhines. Specifically, petitioner has shown good cause  
26 for his failure to previously exhaust his new claims on collateral review in the state courts; at least  
27 one of petitioner’s unexhausted claims is potentially meritorious; and petitioner has not engaged  
28 in intentionally dilatory litigation tactics. Rhines, 544 U.S. at 277-78. Based upon these findings,

1 the undersigned will recommend that petitioner's motion to stay and obey this action be granted.

2 VI. Conclusion

3 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court shall randomly assign a  
4 district judge to this action.

5 Further, IT IS HEREBY RECOMMENDED that:

6 1. Petitioner's motion to stay and obey this action under Rhines v. Weber, 544 U.S. 269  
7 (2005), ECF No. 2, be GRANTED;

8 2. Petitioner be directed to file in this court, within thirty (30) days after the filing date of  
9 the California Supreme Court's final order resolving petitioner's unexhausted claims, a motion to  
10 lift the stay and a motion to file an amended petition for writ of habeas corpus, together with a  
11 proposed First Amended Petition; and

12 3. The Clerk of the Court be directed to administratively close this case for the duration  
13 of the stay.

14 These findings and recommendations are submitted to the United States District Judge  
15 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
16 days after being served with these findings and recommendations, any party may file written  
17 objections with the court. Such document should be captioned "Objections to Magistrate Judge's  
18 Findings and Recommendations." Petitioner is advised that failure to file objections within the  
19 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
20 F.2d 1153 (9th Cir. 1991).

21 DATED: August 9, 2018

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23 ALLISON CLAIRE  
24 UNITED STATES MAGISTRATE JUDGE  
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