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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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8 MARK ANTHONY FREGIA,

No. C 11-3595 SI (pr)

9 Petitioner,

**ORDER TO STAY PROCEEDINGS
AND ADMINISTRATIVELY CLOSE
CASE**

10 v.

11 MIKE McDONALD, warden,

12 Respondent.
13 _____/

14 **INTRODUCTION**

15 Mark Anthony Fregia, an inmate at High Desert State Prison in Susanville, filed this *pro*
16 *se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action is now before
17 the court for consideration of respondent's motion to dismiss for failure to exhaust state court
18 remedies and Fregia's motion for a stay and abeyance. For the reasons discussed below, both
19 motions will be granted and the action will be stayed to permit exhaustion of state court
20 remedies.

21
22 **BACKGROUND**

23 Fregia was convicted in Contra Costa County Superior Court of two counts of murder,
24 one count of attempted manslaughter, arson, mayhem, kidnapping and carjacking. He was
25 sentenced to life in prison without the possibility of parole in February 2008. The California
26 Court of Appeal affirmed the judgment of conviction in 2009 and the California Supreme Court
27 denied his petition for review in 2010. Fregia then filed this action.

28 The petition alleged that the trial court erred in denying the defense's *Batson/Wheeler*

1 they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c).

2 The parties agree that Fregia has not exhausted state court remedies for the two new
3 claims in the first amended petition, and agree that Fregia has a habeas petition pending in state
4 court trying to exhaust those claims. Fregia's first amended petition contains both exhausted and
5 unexhausted claims and therefore is a "mixed" petition. *See Rhines v. Weber*, 544 U.S. 269, 277
6 (2005). The court cannot adjudicate the merits of a habeas petition containing any claim as to
7 which state remedies have not been exhausted, such as a mixed petition. *See Rose v. Lundy*, 455
8 U.S. 509, 522 (1982); *cf.* 28 U.S.C. § 2254(b)(2) (petition may be denied (but not granted)
9 notwithstanding failure to exhaust). Respondent's motion to dismiss is GRANTED. (Docket
10 # 11.)

11 Upon granting a motion to dismiss such as respondent's, the court typically requires a
12 petitioner to choose what to do with his mixed petition problem – i.e., dismiss the unexhausted
13 claims, dismiss the action, or seek a stay and abeyance – but that is unnecessary here because
14 Fregia already has chosen to seek a stay and abeyance. A stay and abeyance "is only
15 appropriate when the district court determines there was good cause for the petitioner's failure
16 to exhaust his claims first in state court," the claims are not meritless, and there are no
17 intentionally dilatory litigation tactics by the petitioner. *See Rhines v. Weber*, 544 U.S. 269, 277-
18 78 (2005). Fregia urged in his unopposed motion that he failed to first exhaust the new claims
19 in state court because appellate counsel failed to raise them on appeal, and he urged that the
20 claims were meritorious. He does not appear to be engaging in dilatory litigation tactics. Upon
21 due consideration, petitioner's motion for a stay and abeyance is GRANTED. (Docket # 12.)

22 Fregia repeatedly makes reference to his appellate attorney's alleged ineffective
23 assistance. However, he has not asserted ineffective assistance of appellate counsel as a claim
24 for federal habeas relief. The court assumes that Fregia intentionally has chosen not to assert
25 such a claim. If Fregia does want to assert an ineffective assistance of counsel claim, he must
26 further amend his first amended petition to specifically allege it. Therefore, when petitioner
27 moves to reopen the action, he must also move to amend to add that claim if he wants to assert
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1 it at all. Petitioner is cautioned that any ineffective assistance of counsel claim cannot be
2 entertained in this court unless and until state court remedies have been exhausted for it.

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CONCLUSION

Respondent's motion to dismiss is GRANTED. (Docket # 11.) Petitioner's motion for a stay and abeyance is GRANTED. (Docket # 12.)

This action is now STAYED and the clerk shall ADMINISTRATIVELY CLOSE the action. Nothing further will take place in this action until Fregia exhausts any unexhausted claims and, within thirty days of doing so, moves to reopen this action, lift the court's stay and amend his first amended petition to add any new claims. Fregia must act diligently to get his state court petition filed and promptly return to federal court after his state court proceedings have concluded.

IT IS SO ORDERED.

DATED: May 19, 2012



SUSAN ILLSTON
United States District Judge