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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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7 AARON ASHLEY,
8 Petitioner,

9 v.

10 TIM VIRGA, Warden,
11 Respondent.

No. C 12-01618 SBA (PR)

**ORDER STAYING HABEAS
PROCEEDINGS; DIRECTING
PETITIONER TO FILE QUARTERLY
STATUS REPORTS; AND DIRECTING
CLERK TO ADMINISTRATIVELY
CLOSE THIS CASE UNTIL THE COURT
ISSUES ORDER LIFTING STAY**

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14 Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus
15 pursuant to 28 U.S.C. § 2254 and an application to proceed in forma pauperis. Petitioner has also
16 filed a motion to stay his federal petition while he exhausts his remedies in state court.

17 **DISCUSSION**

18 Petitioner has exhausted certain claims in his petition; however, he has failed to exhaust state
19 remedies with respect to his "ineffective assistance claim[s] against [his] appellate counsel for
20 missing powerful meritorious claims." (Mot. to Stay at 2.) Therefore, the action must be dismissed
21 as a mixed petition under Rose v. Lundy, 455 U.S. 509, 510 (1982), or in the alternative, Petitioner
22 may elect to delete the unexhausted claims and proceed on the remaining claims. In his motion for a
23 stay, Petitioner requests that he be permitted to return to state court to exhaust the unexhausted
24 claims.

25 Prisoners in state custody who wish to challenge in federal habeas proceedings either the fact
26 or length of their confinement are first required to exhaust state judicial remedies by presenting the
27 highest state court available with a fair opportunity to rule on the merits of each and every claim
28 they seek to raise in federal court. See 28 U.S.C. § 2254(b),(c); Rose, 455 U.S. at 515-16. If

1 available state remedies have not been exhausted as to all claims, the district court must dismiss the
2 petition. Id. at 510; Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988). A dismissal solely for
3 failure to exhaust is not a bar to returning to federal court after exhausting available state remedies.
4 See Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995).

5 District courts have the authority to issue stays and the Antiterrorism and Effective Death
6 Penalty Act of 1996 (AEDPA) does not deprive them of that authority. Rhines v. Webber, 544 U.S.
7 269, 277-78 (2005). The district court's discretion to stay a mixed petition is circumscribed by
8 AEDPA's stated purposes of reducing delay in the execution of criminal sentences and encouraging
9 petitioners to seek relief in the state courts before filing their claims in federal court. Id. Because
10 the use of a stay and abeyance procedure has the potential to undermine these dual purposes of
11 AEDPA, its use is only appropriate where the district court has first determined that there was good
12 cause for the petitioner's failure to exhaust the claims in state court and that the claims are
13 potentially meritorious. Id. Moreover, where granting a stay, the district court must effectuate the
14 timeliness concerns in AEDPA by placing "reasonable limits on a petitioner's trip to state court and
15 back." Id. at 278. Prisoners who may run the risk of having the federal statute of limitations expire
16 while they are exhausting their state remedies may avoid this predicament "by filing a 'protective'
17 petition in federal court and asking the federal court to stay and abey the federal habeas proceedings
18 until state remedies are exhausted." Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005) (citing Rhines,
19 544 U.S. at 277-78).

20 Here, it appears that good cause exists for Petitioner's failure to exhaust his claims on direct
21 appeal because his claims could be raised by way of state habeas corpus. Moreover, the claims state
22 cognizable bases for federal habeas relief. This is Petitioner's first habeas petition, and there is no
23 evidence that he seeks the stay for improper purposes. See Fetterly v. Paskett, 997 F.2d 1295, 1301-
24 02 (9th Cir. 1993) (holding that a stay for the purpose of permitting exhaustion of unexhausted
25 claims should be granted only if the claims petitioner seeks to pursue are cognizable under § 2254;
26 there is a likelihood of prejudice to petitioner if the stay is not granted; and there is no evidence that
27 the motion for a stay is brought to delay, vex, or harass, or that the request is an abuse of the writ).

1 Additionally, the Court notes that Respondent has yet to file an answer on the merits to the petition.
2 Accordingly, Petitioner's motion to stay the instant petition is GRANTED.

3 **CONCLUSION**

4 For the foregoing reasons, Petitioner's motion to stay the instant petition (docket no. 3) is
5 GRANTED. These proceedings are hereby STAYED pending Petitioner's exhaustion of his state
6 judicial remedies. Petitioner must act diligently in exhausting his state judicial remedies, or the stay
7 may be lifted. He must file quarterly reports describing the progress of his state court proceedings,
8 commencing **thirty (30) days** from the date of this Order and continuing every **ninety (90) days**
9 thereafter until his state court proceedings are terminated. He must also attach to his status reports
10 copies of the cover page of any document that he files with or receives from the state courts relating
11 to the claims.

12 The Clerk of the Court shall ADMINISTRATIVELY CLOSE the file pending the stay of this
13 action. Nothing further will take place in this action until Petitioner receives a final decision from
14 the highest state court and, within **thirty (30) days** of doing so, moves to reopen the action, lift the
15 Court's stay and amend the stayed petition to add the newly-exhausted claims.

16 Petitioner's application to proceed in forma pauperis (docket no. 4) is GRANTED.

17 This Order terminates Docket nos. 3 and 4.

18 IT IS SO ORDERED.

19 DATED: 6/20/12


SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

AARON ASHLEY,
Plaintiff,

Case Number: CV12-01618 SBA

CERTIFICATE OF SERVICE

v.

TIM VIRGA et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 21, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Aaron Ashley AA3143
California State Prison - Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: June 21, 2012

Richard W. Wieking, Clerk
By: Lisa Clark, Deputy Clerk