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E-FILED on 09/29/09

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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12 WILLIAM MARTINEZ,

No. C-08-05232 RMW

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Petitioner,

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v.

ORDER GRANTING REQUEST FOR STAY
PENDING APPEAL

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MIKE MCDONALD, Warden,

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Respondent.

[Re: Docket No. 4]

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On November 19, 2008, petitioner William Martinez filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 13, 2009, petitioner filed a request for this court to stay the federal proceedings while he exhausts additional claims in state court (Docket No. 4).

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Petitioner alleges that he intends to exhaust his state remedies regarding counsel of choice. *Id.*

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BACKGROUND

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In December of 2004 a jury found petitioner guilty as an aider and abettor of attempted murder as well as assault with a deadly weapon. Petition at 3-4 (Docket No. 1). He was sentenced to fifteen years to life. *Id.* at 4. After a direct appeal, the California Supreme Court denied review on August 22, 2007. *Id.* Petitioner filed the present federal habeas action on November 19, 2008. In January of 2009, petitioner filed the instant motion to stay.

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ORDER

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Accordingly, the Court orders as follows:

1. Petitioner's motion for a stay is GRANTED. This action is hereby STAYED while petitioner exhausts his unexhausted claims in the state courts.
2. If petitioner wishes to have this court consider any of his unexhausted claims, he must properly present those claims to the California Supreme Court within thirty days of the date this order is filed. Thereafter, within thirty days of the California Supreme Court's decision, he must file an amended petition in this court setting forth his newly exhausted claims in addition to any previously exhausted claims he still wishes to have this Court consider.
3. The amended petition must include the caption and civil case number used in this order (No. C-08-05232 RMW and the words FIRST AMENDED PETITION on the first page. The amended petition supersedes the original petition, and petitioner may not incorporate material from the prior petition by reference. The amended petition must only include exhausted claims, and it must forth all the claims petitioner wishes this court to consider with sufficient clarity and particularity for respondent to prepare an answer.
4. This stay will be lifted, and this matter will proceed, only upon the filing of the above-described amended petition, or a notice that petitioner has decided to abandon his unexhausted claims and wishes to proceed only with the exhausted claims in the original petition. If petitioner does not take any further action, this case will remain stayed and he will not receive any ruling by the court on his petition.

The Clerk shall ADMINISTRATIVELY CLOSE the file pending the stay of this action, and terminate Docket No. 4. This has no legal effect; it is purely a statistical procedure. When petitioner informs the court that exhaustion has been completed the case will be administratively re-opened.

DATED: 09/29/09 
RONALD M. WHYTE
United States District Judge

