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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Demetrius Sissac,

Petitioner,

v.

W.L. Montgomery,

Respondents.

Case No.: 16-cv-02287-BAS-JLB

ORDER GRANTING MOTION TO STAY

[ECF No. 14]

I. INTRODUCTION

Petitioner Demetrius Sissac, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”), challenging his San Diego County Superior Court conviction of second degree murder with a firearm in case number SCE315928. (ECF No. 1 at 1; ECF No. 8-14 at 1-2.)¹ Respondent filed its Answer and Memorandum of Points and Authorities in Support of the Answer, arguing in part that the Petition should be dismissed for failure to exhaust. In response, Petitioner filed a motion seeking a stay and abeyance of the claims raised in the Petition to afford him time to exhaust his claims before the California Supreme Court (“Motion to Stay”). (ECF No. 14.) Respondent filed an opposition to the Motion to Stay,

¹ Page numbers for docketed materials cited herein refer to those imprinted by the court’s electronic case filing system.

1 and Petitioner filed a reply thereto. (ECF Nos. 16, 18.) The Motion to Stay is presently
2 before the Court.

3 **II. BACKGROUND**

4 A jury found Petitioner guilty of second degree murder with a firearm. (ECF No. 8-
5 14 at 2.) The trial court sentenced him to a total term of forty years to life. (Id.) Through
6 counsel, Petitioner separately filed both an appeal (ECF No. 8-12) and a petition for writ
7 of habeas corpus (ECF No. 8-15) in the California Court of Appeal. The appeal consisted
8 of evidentiary-error claims. The habeas petition alleged the trial counsel was ineffective
9 for failing to object to the evidentiary-error claims made on appeal. (Id.) On March 3,
10 2015, the Court of Appeal denied Petitioner's motion to consolidate the two cases and
11 issued separate disposition orders, affirming the judgment and denying relief. (ECF Nos.
12 8-14, 8-16, and 18 at 3.)

13 The Court of Appeal's habeas order on Petitioner's state habeas petition was a one
14 page disposition order that incorporated its thirty-one page disposition order denying
15 Petitioner's appeal. The text of the habeas order was as follows:

16 Demetrius Sissac's petition for writ of habeas corpus has
17 been read and considered by Justices Nares, Haller, and
18 McIntyre.[]

19 Sissac's petition relates to the claims of prejudicial
20 evidentiary error and ineffective assistance of counsel raised in
21 his direct appeal. For reasons explained in our opinion in the
22 direct appeal, we reject Sissac's claims.

23 The petition is denied, as is appellant's motion to
24 consolidate the petition with the appeal.

25 (ECF No. 18 at 3 (footnote omitted); see also ECF No. 8-16.) The habeas order also
26 included a single footnote that stated, "By order dated June 16, 2014, this court directed
27 that the petition be considered at the same time as the appeal in this matter (People v. Sissac
28 (Mar. 3, 2015, D064910) [nonpub. opn.]). We take judicial notice of that appeal." (ECF
No. 18 at 3.)

1 Then, still represented by counsel, Petitioner filed a petition for review before the
2 California Supreme Court with respect to the appeal only. (ECF No. 8-17.) Petitioner took
3 no further state-court action on his ineffective-assistance claims – the same claims for
4 which he seeks federal habeas relief in this case.

5 III. ANALYSIS

6 The Petition is comprised of the following five claims for habeas relief: (1) the
7 cumulative impact of errors and omissions by trial counsel deprived Petitioner of his right
8 to a fair trial; (2) trial counsel was ineffective for failing to renew at trial his pretrial
9 objections to the admission of text messages; (3) trial counsel was ineffective in failing to
10 specifically object to evidence of deleted text messages and telephone calls; (4) trial
11 counsel was ineffective for conceding that Petitioner’s statements in a recorded telephone
12 call were admissible; and (5) trial counsel was ineffective in failing to object to improper
13 lay opinion testimony by witnesses. (ECF No. 1.) Petitioner argues that he recently learned
14 that each of these claims are unexhausted, and thus filed the Motion to Stay so that he can
15 exhaust his claims before the California Supreme Court. (ECF No. 14, 18.)

16 Prisoners in state custody who wish to challenge collaterally in federal habeas
17 proceedings either the fact or length of their confinement are first required to exhaust state
18 judicial remedies, either on direct appeal or through collateral proceedings, by presenting
19 the highest state court available with a fair opportunity to rule on the merits of each and
20 every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The petitioner
21 must give the state courts a full opportunity to resolve any constitutional issues by invoking
22 one complete round of the state’s established appellate review process, which includes
23 seeking discretionary review. See *O’Sullivan v. Boerkel*, 526 U.S. 838, 841-47 (1999);
24 *Farmer v. Baldwin*, 497 F.3d 1050, 1053 (9th Cir. 2007). Thus, in California, habeas

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1 petitioners are required to exhaust their claims in a petition for review to the California
2 Supreme Court.² *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999).

3 Recently, in *Mena v. Long*, 813 F.3d 907, 911 (9th Cir. 2016), the Ninth Circuit held
4 that “a district court has the discretion to stay and hold in abeyance fully unexhausted
5 petitions under the circumstances set forth in *Rhines* [*v. Weber*, 544 U.S. 269 (2005)].” A
6 stay under *Rhines*, “is only appropriate when the district court determines there was good
7 cause for the petitioner’s failure to exhaust his claims first in state court,” the claims are
8 not meritless, and there are no intentionally dilatory litigation tactics by the petitioner.
9 *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Any such stay must be limited in time to
10 avoid indefinite delay. *Id.*

11 On January 24, 2017, Respondent filed its opposition to Petitioner’s Motion to Stay.
12 (ECF No. 16.) Respondent argues that a stay is not appropriate here because Petitioner
13 failed to show good cause for his failure to exhaust and Petitioner’s claims are meritless.
14 (*Id.*) On reply, however, Petitioner provides a declaration explaining the circumstances
15 behind his belief that he had exhausted both his appellate and habeas claims before the
16 California Supreme Court. (ECF No. 18.) Petitioner states:

17 Respondent has filed his Opposition to my motion for a
18 Stay and Abeyance claiming ‘good cause’ was not shown. It is
19 true a petition for Writ of Habeas Corpus was filed separately
20 [sic] from an Appeal in the California Court of Appeal on my
21 behalf. While these two motion[s] were filed separately [sic],
22 there was also a motion put in to consolidate the two cases and
23 have them decided together. This motion for consolidation of
24 the Appeal and Habeas Petition was denied. However, I never
25 received the Court Order of the denial, therefore it was my
26 assumption this whole time that my petition for review in the
27 California Supreme Court applied to both my direct appeal, and
28 my habeas petition.

² Courts can excuse this exhaustion requirement if “(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B). Petitioner does not argue that either of these exceptions should apply here.

1 I filed the habeas petition in the United States District
2 Court under the belief that my petition was fully exhausted and
3 had not realized my error until after the respondent brought it up
4 in his answer to my Petition for Writ of Habeas Corpus. I spoke
5 with Counsel Raymond M. Diguiseppe state bar No: 228457 who
6 was assigned to my appeal. He informed me that he had in fact
7 mailed the denial for consolidation in a timely matter to me, but
8 that it might have been lost in the mail. This document has
9 recently been mailed to me and there is no more confusion on
10 this matter. (see attached document) I want to inform the court
11 that in no way am I trying to use stall tactics and that I am ready
12 for my habeas petition to be decided in the District Court. I am
13 asking the Court to grant me a Stay and Abeyance so that I can
14 fully exhaust these issues and have them decided. I believe my
15 habeas petition does hold merit on account of it addresses my
16 Sixth Amendment Right to Assistance of Counsel.

17 (ECF No. 18 at 1-2.) Petitioner's claimed good faith belief that he thought he had
18 exhausted his claims with the California Supreme Court is consistent with Petitioner
19 checking the box, as to each ground, indicating he had raised the ground in the California
20 Supreme Court in case number S225613.³ His claim of having a good faith belief that he
21 had exhausted is further supported by the fact that Petitioner, in order to demonstrate
22 exhaustion, attached to his Petition the June 10, 2015 California Supreme Court order
23 denying his appeal in case S225613. (ECF No. 1.)

24 The Court finds that Petitioner has shown good cause for a stay of his Petition.
25 Although the Court at this stage makes no determination on the merits of this case,
26 Petitioner raises colorable federal claims and the Court cannot say at this time that
27 Petitioner clearly has no hope of prevailing. See *Dixon v. Baker*, 847 F.3d 714, 722 (9th
28 Cir. 2017) ("principles of comity and federalism demand that the federal court refrain from
ruling on the merits of the [unexhausted] claim unless 'it is perfectly clear that the petitioner

³ Concededly, the Petition is internally inconsistent, in that, earlier in the Petition, in response to the question of whether Petitioner had previously filed any petitions ("e.g., a Petition for Writ of Habeas Corpus") in the California Supreme Court, Petitioner checked, "No."

1 has no hope of prevailing”). In addition, it appears that no prejudice would inure to the
2 parties by granting the requested stay. Also, there is no indication that Petitioner has
3 engaged in intentionally dilatory litigation tactics.

4 Therefore, the Court will grant Petitioner’s motion for a stay of the proceedings and
5 will hold the Petition in abeyance pending exhaustion of Petitioner’s state remedies.

6 However, the Court will not hold the Petition in abeyance indefinitely. No later than
7 **June 9, 2017**, Petitioner must inform the Court of the status of the habeas proceedings
8 before the California Supreme Court, including the date(s) his case(s) were filed, the case
9 number(s), and any outcome(s). Further, Petitioner must proceed diligently to pursue his
10 state court remedies, and Petitioner must file a new status report regarding the status of his
11 state court habeas corpus proceedings before the California Supreme Court every sixty (60)
12 days after the filing of the initial status report. Following a disposition order by the
13 California Supreme Court on Petitioner’s state habeas petition, Petitioner will be allowed
14 thirty (30) days within which to file a motion to vacate the stay to have his newly exhausted
15 claims decided in this District Court. Failure to comply with these instructions and time
16 allowances will result in this Court vacating the stay nunc pro tunc to the date of this order.

17 **IV. CONCLUSION**

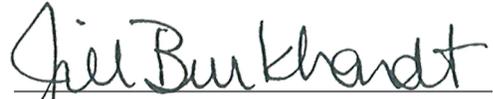
18 For the reasons outlined above, the Motion to Stay (ECF No. 14) is **GRANTED**.
19 No later than **June 9, 2017**, Petitioner must inform the Court of the status of the state habeas
20 proceedings before the California Supreme Court, including the date(s) his case(s) were
21 filed, the case number(s), and any outcome(s). Further, Petitioner must file a new status
22 report regarding the status of his state court habeas corpus proceedings before the
23 California Supreme Court every sixty (60) days after the filing of the initial status report.
24 Following a disposition order by the California Supreme Court on Petitioner’s state habeas
25 petition, Petitioner will be allowed thirty (30) days within which to file a motion to vacate
26 the stay to have his newly exhausted claims decided in this District Court. Petitioner is

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1 cautioned that failure to comply with these instructions and time allowances will result in
2 this Court vacating the stay nunc pro tunc to the date of this order.

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4 Dated: May 10, 2017

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6 Hon. Jill L. Burkhardt
7 United States Magistrate Judge
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