UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| DE'ANTE WHITAKER,<br>Petitioner,<br>v.<br>HORN,<br>Respondent. | No. 2:25-cv-0747 TLN CSK P<br><br>ORDER AND FINDINGS & RECOMMENDATIONS |

## I. INTRODUCTION

Petitioner is a state prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before this Court is respondent's motion to dismiss, petitioner's motion to stay this action pursuant to Rhines v. Weber, 544 U.S. 269 (2005) and petitioner's motion for a thirty day extension of time to make copies. (ECF Nos. 13, 17, 18.) For the following reasons, petitioner's motion for extension of time is denied as unnecessary. For the following reasons, this Court recommends that petitioner's motion to stay be denied, respondent's motion to dismiss be granted and petitioner be granted leave to file an amended petition raising only his exhausted claims.

## II. LEGAL STANDARD RE: EXHAUSTION AND STAY AND ABEYANCE

Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required before claims can be granted by the federal court in a habeas corpus case. See Rose v. Lundy, 455 U.S. 509, 515-16 (1982). The exhaustion doctrine is based on a policy of federal and state comity,



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designed to give state courts the initial opportunity to correct alleged constitutional deprivations. See Picard v. Connor, 404 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518.

Regardless of whether the claim was raised on direct appeal or in a post-conviction proceeding, the exhaustion doctrine requires that each claim be fairly presented to the state's highest court. See Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim has been fairly presented if the petition has described both the operative facts and the federal legal theory on which the claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). Although the exhaustion doctrine requires only the presentation of each federal claim to the highest state court, the claims must be presented in a posture that is acceptable under state procedural rules. See Sweet v. Cupp, 640 F.2d 233, 237 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is denied by the state courts on procedural grounds, where other state remedies are still available, does not exhaust the petitioner's state remedies. See Pitchess v. Davis, 421 U.S. 482, 488 (1979); Sweet, 640 F.2d at 237-38.

When a habeas petition presents both exhausted and unexhausted claims, the petition is considered "mixed." See Dixon v. Baker, 847 F.3d 714, 718 (9th Cir. 2017). Generally, "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Rose, 455 U.S. at 522. However, a petitioner may avoid dismissal through seeking a stay and abeyance of his petition. See Butler v. Long, 752 F.3d 1177, 1180 (9th Cir. 2014). The purpose of a stay and abeyance is to give a petitioner the opportunity to exhaust his claims in state court before presenting them in federal court. See Dixon, 847 F.3d at 718-20. In this circuit, two procedures for staying a petition may be available while a petitioner exhausts his claims in state court. See Rhines, 544 U.S. 269; Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007).

A Rhines stay may be employed as to both mixed petitions and petitions raising only unexhausted claims. See Mena v. Long, 813 F.3d 907, 908 (9th Cir. 2016). A Rhines stay is appropriate if (1) the petitioner has good cause for his failure to exhaust, (2) his unexhausted claims are potentially meritorious, and (3) there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. See Rhines, 544 U.S. at 278.

## III. BACKGROUND

On May 29, 2025, respondent filed the pending motion to dismiss arguing that petitioner's petition should be dismissed as a mixed petition because it contained exhausted and unexhausted claims. (ECF No. 13.) On July 1, 2025, this Court issued an order and findings and recommendations addressing the motion to dismiss. (ECF No. 14.) This Court found that the petition raised exhausted and unexhausted claims. (Id.) Petitioner was granted thirty days to file a stay pursuant to Rhines or Kelly. (Id.) In the July 1, 2025 order, this Court set forth the legal standards for stays pursuant to Rhines and Kelly. (Id.) This Court also recommended that petitioner's claim pursuant to the California Racial Justice Act ("CRJA") be dismissed for failing to state a cognizable claim. (Id.) These findings and recommendations recommending dismissal of petitioner's claim pursuant to the CRJA are pending before the district court. On August 14, 2025, petitioner filed a motion to stay pursuant to Rhines. (ECF No. 17.) On September 2, 2025, respondent filed an opposition. (ECF No. 19.) For clarity, this Court below restates the previous findings regarding the exhaustion of the claims raised in the petition.

### A. Claims Raised in Petition

This action proceeds on the petition filed March 3, 2025. (ECF No. 1.) Petitioner challenges his 2022 conviction from the Sacramento County Superior Court for first degree murder and use of a deadly weapon. (Id. at 1.) Petitioner is serving a sentence of 26 years to life. (Id.) The petition raises four claims: (1) prosecutorial misconduct; (2) trial court error; (3) violation of the CRJA; and (4) ineffective assistance of counsel. (Id. at 4-5.) Petitioner's claims are difficult to understand. This Court below discusses the apparent grounds of petitioner's claims alleging prosecutorial misconduct, trial court error and ineffective assistance of counsel.

Petitioner appears to raise the following claims of prosecutorial misconduct: (1) the prosecutor wrongly excluded testimony from witnesses who would have testified regarding the victim's past use of racial epithets (id. at 7-8); (2) the prosecutor wrongly discredited the testimony of petitioner's son by insinuating that petitioner's son was not being truthful (id.); (3) the prosecutor demonstrated racial bias toward African Americans (id. at 8-10); and (4) during

closing argument, the prosecutor misstated the law regarding voluntary manslaughter (id. at 11).

Petitioner appears to raise the following claims of trial court error: (1) the trial court prevented petitioner from questioning witnesses regarding whether they heard the victim state racial epithets in the past (id. at 15-16; 24); (2) the trial court prevented petitioner from asserting his defense that the prosecutor coerced witnesses into testifying against petitioner (id. at 15-16); (3) the trial court improperly instructed the jury (id. at 17-18, 21-22); and (4) the trial court failed to correct the inappropriate charge of first degree murder (id. at 18-20.).

Petitioner appears to raise the following claims of ineffective assistance of counsel: (1) trial counsel failed to object to the prosecutor's misstatement of the law regarding voluntary manslaughter (id. at 31); (2) trial counsel failed to object to faulty jury instructions (id.); (3) trial counsel failed to "introduce evidence that in part led to the victim's act of provocation being a sledgehammer" (id.); and (4) trial counsel failed to investigate the victim's prior use of racial epithets (id.).

**B. Petitioner's State Appeal**

Following petitioner's conviction, the California Court of Appeal affirmed the judgment. (See ECF No. 12-2 (lodged document no. 2).) On January 16, 2024, petitioner filed a petition for review in the California Supreme Court. (See ECF No. 12-3 (lodged document no. 3).) On February 21, 2024, the California Supreme Court denied the petition for review without comment or citation. (See ECF No. 12-4 (lodged document no. 4).) In the motion to dismiss, respondent states that petitioner did not file any state post-conviction collateral challenges related to his conviction.

In his appeal filed in the California Court of Appeal, petitioner raised the following claims: (1) the trial court erred by excluding evidence of the victim's prior use of a racial epithet; (2) the prosecutor committed misconduct during closing argument when they misstated the law regarding the standard for voluntary manslaughter; (3) trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law regarding voluntary manslaughter during closing argument; (4) the trial court erred in denying petitioner's motion for a new trial; and (5) cumulative error. (ECF No. 12-2 (lodged document no. 2).)

In the petition for review filed in the California Supreme Court, petitioner raised the following claims: (1) the California Supreme Court should transfer the matter to the California Court of Appeal in light of the recently enacted CRJA, Cal. Penal Code § 745; (2) the trial court erred by excluding evidence of the victim's prior use of a racial epithet; (3) trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law regarding voluntary manslaughter during closing argument; and (4) the trial court erred in denying petitioner's motion for a new trial. (ECF No. 12-3 (lodged document 3).)

**C. Discussion of Federal Claims re: Exhaustion**

Because this Court recommended that petitioner's claim pursuant to the CRJA be dismissed as not cognizable, this Court need not address whether this claim is exhausted.

1. Claims Alleging Trial Court Error

As observed by respondent in the motion to dismiss, in the petition for review petitioner raised only one of the claims of trial court error raised in the instant petition: the trial court erred by excluding evidence of the victim's prior use of a racial epithet. Therefore, this is the only trial court error claim exhausted by petitioner. The other claims of trial court error are not exhausted, i.e., the claims alleging that the trial court prevented petitioner from asserting his defense that the prosecutor coerced witnesses into testifying against petitioner, improperly instructed the jury and failed to correct the inappropriate charge of first degree murder.

2. Ineffective Assistance of Counsel

As observed by respondent in the motion to dismiss, in the petition for review petitioner raised only one of the ineffective assistance of counsel claims raised in the instant petition: trial counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the law regarding voluntary manslaughter. Therefore, this is the only ineffective assistance of counsel claim exhausted by petitioner. The other claims of ineffective assistance of counsel are not exhausted, i.e., the claims alleging trial counsel was ineffective for failing to object to faulty jury instructions, failing to introduce evidence and failing to investigate the victim's prior use of racial epithets.

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3. Claims Alleging Prosecutorial Misconduct

As observed by respondent in the motion to dismiss, in the petition for review petitioner did not raise any prosecutorial misconduct claims. Therefore, none of petitioner's prosecutorial misconduct claims are exhausted. This Court observes that in the petition for review, petitioner argued that the prosecutor's misstatement regarding the legal standard for voluntary manslaughter violated due process. (ECF No. 12-3 at 29-33 (lodged document 3).) However, this argument was made within petitioner's discussion of his claim alleging that trial counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the law regarding voluntary manslaughter. In the petition for review, petitioner argued that the prosecutor's alleged misstatement of the law met the prejudice prong of the ineffective assistance of counsel standard. See Strickland v. Washington, 466 U.S. 668, 688, 694 (1984) (to demonstrate ineffective assistance of counsel under the Sixth Amendment, petitioner must show (1) counsel's representation falls below an objective standard of reasonableness; and (2) petitioner is prejudiced by an unreasonable performance). In the petition for review, petitioner did not raise a prosecutorial misconduct claim regarding the prosecutor's alleged misstatement of the law regarding voluntary manslaughter.

4. Conclusion

For the reasons discussed above, only two of the cognizable claims raised in the petition are exhausted: (1) the trial court erred by excluding evidence of the victim's prior use of a racial epithet; and (2) trial counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the law regarding voluntary manslaughter. Therefore, the instant petition is a mixed petition.

**IV. MOTION TO STAY**

In the motion to stay, petitioner devotes much of his argument to the merits of his claims. (ECF No. 17 at 1-9.) Petitioner claims that his unexhausted claims were not exhausted sooner because his appellate counsel told petitioner that all state remedies "were done" and that "all that was left to do was in federal court, which was untrue." (Id. at 9.) Petitioner states that he has not engaged in dilatory tactics. (Id.)

This Court first addresses whether petitioner meets the "good cause" requirement for a Rhines stay. The "good cause" requirement under Rhines does not require a showing of "extraordinary circumstances." Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). Rather, "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify that failure." Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014) (citing Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005)). As stated above, petitioner argues that he failed to exhaust his unexhausted claims because his appellate counsel told petitioner that all state remedies "were done" and all that was left to do was in federal court, which was not true. Attached to the pending motion is a letter to petitioner from his appellate counsel dated March 4, 2024 which contradicts petitioner's claim regarding appellate counsel's representations. In this letter, appellate counsel advises petitioner that the California Supreme Court denied the petition for review. (ECF No. 17 at 11.) The letter then states,

> This means our appeal is now at an end. Please note I do not practice in federal court and I have not been appointed to represent you in any federal court proceedings. Therefore, I cannot advise you on whether or any petitions in federal court are appropriate. (28 U.S.C. § 2254.)
>
> However, if you choose to file a petition for writ of habeas corpus in federal court, please note you must do so within one year of the date the Petition for Review was denied. (28 U.S.C. § 2244(d).) The petition for review was denied on February 21, 2024.
>
> I will not be taking any further legal action on your behalf. Although this is a disappointing outcome, I want to thank you for your cooperation during this process. It has been a privilege to represent you.

(Id. at 11-12.)

In the March 4, 2024, letter, appellate counsel did not advise petitioner that all remedies were done and that all that was left to do was file in federal court. Appellate counsel advised petitioner that petitioner's appeal was over and that appellate counsel could not advise petitioner on whether a federal habeas corpus petition was appropriate. Appellate counsel then advised petitioner of the one year statute of limitations for filing a federal habeas corpus petition.

To the extent petitioner claims that he thought his unexhausted claims were raised in his direct appeal, petitioner being "under the impression" that he exhausted his claims is not good

cause under Rhines. See Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008) (petitioner's "impression" that claim was included in an appellate brief is not good cause under Rhines). To the extent petitioner claims that he believed that he did not need to exhaust the claims not raised in the state appeal, petitioner's ignorance of the law does not establish good cause under Rhines. See Blake, 745 F.3d at 981 ("unspecific, unsupported excuses for failing to exhaust—such as unjustified ignorance—[do] not satisfy the good cause requirement."); Mitchell v. Hedgepeth, 2015 WL 8567384, at *4 (C.D. Cal. Aug. 14, 2015), findings and recommendations adopted, 2015 WL 8664149 (C.D. Cal. Dec. 11, 2015) (ignorance of the law does not constitute good cause) (collecting cases).

In the opposition, respondent argues that petitioner has not shown that he did not intentionally engage in dilatory tactics. (ECF No. 19 at 3.) This Court need not determine whether petitioner engaged in intentional dilatory tactics or whether his unexhausted claims are potentially meritorious, because petitioner's failure to demonstrate good cause for his failure to exhaust his unexhausted claims warrants denial of the motion to stay. See Rhines, 544 U.S. at 277-78.[1] This Court also recommends that respondent's motion to dismiss the petition as a mixed petition be granted and that petitioner be granted thirty days from the district court's adoption of these findings and recommendations to file an amended petition raising only his cognizable exhausted claims: (1) the trial court erred by excluding evidence of the victim's prior use of a racial epithet; and (2) trial counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the law regarding voluntary manslaughter.

## V. MOTION FOR THIRTY DAY EXTENSION OF TIME

Petitioner requests a thirty day extension of time to make two copies of the pending

[11] As observed by respondent in the opposition, shortly after deciding Rhines, the Supreme Court suggested that a petitioner could file a "protective" petition in federal court and ask the federal court to stay the federal habeas proceedings until the state remedies are exhausted. See Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005). The Supreme Court stated that a petitioner's reasonable confusion about whether a state filing would be timely would ordinarily constitute "good cause" for him to file in federal court. Id. However, Pace does not apply here because petitioner did not file any petition in state court. The decision in Pace only contemplates the situation in which a petitioner is pursuing state postconviction relief and is unsure whether the state filing would be timely. Here, petitioner was not pursuing any state post-conviction relief.

motion to stay. (ECF No. 18.) Petitioner states that he was unable to make copies of his motion to stay because his prison was on lockdown. (Id.) Petitioner apparently required the copies of the motion to stay in order to serve on respondent. (Id.) A notice of the filing of petitioner's motion to stay was electronically served on respondent's counsel. The filing of respondent's opposition demonstrates that respondent reviewed petitioner's motion on the court docket. Accordingly, petitioner's motion for an extension of time to make copies is denied as unnecessary.

Accordingly, IT IS HEREBY ORDERED that petitioner's motion for an extension of time (ECF No. 18) is denied as unnecessary; and

IT IS HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss the petition as a mixed petition (ECF No. 13) be granted;

2. Petitioner's motion to stay (ECF No. 17) be denied; and

3. Petitioner be granted thirty days from the adoption of these findings and recommendations to file an amended petition raising only his exhausted claims.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 21, 2025

CHI SOO KIM
UNITED STATES MAGISTRATE JUDGE

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