

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

<b>Case No.</b>	CV 16-06817-JVS (AS)	<b>Date</b>	December 20, 2016
<b>Title</b>	<u>Kyung Hwan Choi v. David Long, Warden</u>		

<b>Present: The Honorable</b>	Alka Sagar, United States Magistrate Judge		
	Alma Felix	N/A	
	Deputy Clerk	Court Reporter / Recorder	
	Attorneys Present for Petitioner:	Attorneys Present for Respondent:	
	N/A	N/A	
<b>Proceedings:</b>	<b>(IN CHAMBERS) ORDER RE THREE OPTIONS</b>		

On September 12, 2016, Kyung Hwan Choi (“Petitioner”), a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition”). (Docket Entry No. 1). The Petition asserts the following grounds for federal habeas relief:

- (1) “The Trial Court’s failure to Give a Unanimity Instruction as to The Conspiracy Charge Violated petitioner’s Federal Due Process Rights;”
- (2) “Petitioner was denied Due Process of Law because the evidence was insufficient to support conviction of conspiracy and burglary;”
- (3) “The Trial court’s failure to adequately instruct the jury on the natural and probable consequences doctrine violated Petitioner’s Federal Due Process Rights;” and
- (4) Petitioner is actually innocent based on “newly discovered evidence,” specifically, sworn affidavits of multiple individual(s) who “have been convicted of the charged offenses” and who “are now willing to exonerate Petitioner of the crimes “Petitioner never committed.” (Petition at 6-12).

On December 16, 2016, Respondent filed a Motion to Dismiss the Petition (“Motion to Dismiss”) (Docket Entry No. 15), contending that Ground Four alleged in the Petition is unexhausted because Petitioner has failed to present Ground Four to the California

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Supreme Court. (See Motion to Dismiss at 5–7).<sup>1</sup>

A state prisoner must exhaust his state court remedies before a federal court may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1)(A); O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). To satisfy the exhaustion requirement, a habeas petitioner must “fairly present” his federal claims in the state courts in order to give the state the opportunity to pass upon and correct alleged violations of the petitioner’s federal rights. Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam). A petitioner must present his claims to the highest court with jurisdiction to consider them (typically the state supreme court), or demonstrate that no state remedy is available. See Peterson v. Lampert, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). The fair presentation requirement is not met if the state’s highest court does not reach the merits of a claim due to the procedural context in which it was presented. See Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994) (“Submitting a new claim to the state’s highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation.”) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)); Harris v. Superior Court, 500 F.2d 1124, 1126–28 (9th Cir. 1974) (a claim denied by state’s highest court as procedurally deficient, either explicitly or by citation of authority, does not exhaust the claim).

As Petitioner concedes (see Petition at 11-12), Ground Four of the Petition has not been presented to the California Supreme Court (see Respondent’s Notice of Lodging [“Lodgment”] No. 3); see also <http://appellatecases.courtinfo.ca.gov> [last visited December 19, 2016]), and consequently is unexhausted.

Therefore, Petitioner has put forth an unexhausted claim that makes his Petition a mixed petition, subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 522 (1982) (“In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner’s right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.”). Yet a court may not dismiss a mixed

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<sup>1</sup> An Opposition or Notice of Non-Opposition to the Motion to Dismiss (see Docket Entry No. 4 at 4) is not necessary, since Petitioner has conceded that Ground Four alleged in the Petition is unexhausted (see Petition at 11-12).

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petition without first providing the petitioner the opportunity to amend the pleading to delete any unexhausted claims. Jefferson v. Budge, 419 F.3d 1013, 1015–16 (9th Cir. 2005) (citing, inter alia, Rose, 455 U.S. at 510).

Petitioner may request a dismissal of the entire Petition without prejudice. However, Petitioner is cautioned that dismissal of the present proceeding (even dismissal “without prejudice”) might contribute toward a statute of limitations bar against a federal petition subsequently filed by Petitioner.<sup>2</sup> Although 28 U.S.C. § 2244(d)(2) tolls the statute of limitations during the pendency of “a properly filed application for State post-conviction or other collateral review,” the statute of limitations **will not be tolled** during the pendency of the instant Petition. See Duncan v. Walker, 533 U.S. 167, 181–82 (2001).

Additionally, in “limited circumstances,” a district court has discretion to stay and hold in abeyance a mixed habeas corpus petition pending exhaustion of state remedies. Rhines v. Weber, 544 U.S. 269, 277–78 (2005). Stay and abeyance is “only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.” Id. at 277; see also Jackson v. Roe, 425 F.3d 654, 660–61 (9th Cir. 2005). Under Rhines, “it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines, 544 U.S. at 278.

However, since the Court has already issued an Order Denying Stay of the Petition (see Docket Entry Nos. 3, 7 [Order Denying Petitioner’s Motion for Reconsideration of the Order Denying Stay of the Petition]), a stay of the Petition under Rhines is not available to Petitioner.

<sup>2</sup> Although the statute of limitations is also subject to equitable tolling “in appropriate cases,” Holland v. Florida, 560 U.S. 631, 645 (2010), this Court need not, and does not, now determine whether equitable tolling might apply with respect to a federal petition that Petitioner subsequently might file. Nor does the Court express any opinion concerning the merits of any petition that Petitioner may file in the California Supreme Court, noting that even if there exists an applicable state procedural bar, the California Supreme Court nevertheless might choose to reach the merits of Petitioner’s claims. See, e.g., Park v. California, 202 F.3d 1146, 1153–54 (9th Cir. 2000).

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Prior to Rhines, in 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) (“Kelly”), the Ninth Circuit held that a district court has discretion to allow a petitioner to amend a mixed petition to delete any unexhausted claims, stay the fully exhausted petition pending exhaustion of the unexhausted claims, and then allow the petitioner to amend the petition to include the newly exhausted claims. See id. at 1070–71; see also Olvera v. Giurbino, 371 F.3d 569, 573–74 (9th Cir. 2004). In King v. Ryan, 564 F.3d 1133 (9th Cir. 2009), the Ninth Circuit held that the Kelly procedure remains an option after Rhines, and that the propriety of a Kelly stay does not depend on a showing of good cause for the failure to exhaust. Id. at 1143. A Kelly stay “is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [28 U.S.C. § 2244(d)].” Kelly, 315 F.3d at 1070. However, a petitioner’s invocation of Kelly is subject to the requirement that once the petitioner has fairly presented his now exhausted claim(s), the newly exhausted (and possibly otherwise time-barred) claim(s) must “share[ ] a ‘common core of operative facts’ with the [exhausted] claims in the pending petition.” King, 546 F.3d at 1141 (quoting Mayle v. Felix, 545 U.S. 644, 659 (2005)). A claim in an amended petition does not relate back “when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.” Hebner v. McGrath, 543 F.3d 1133, 1138 (9th Cir. 2008); see Mayle, 545 U.S. at 660–61.

Accordingly, the Court will afford Petitioner the opportunity to address the defects discussed herein which preclude the consideration of the Petition by the Court. He may voluntarily dismiss the Petition; dismiss the unexhausted claim (Ground Four) and proceed on only the exhausted claims (Grounds One through Three); or request a stay, under Kelly, of his fully exhausted claims pending the exhaustion of the unexhausted claim.

Thus, Petitioner has the following three options:

**Option 1:** Petitioner may request a voluntary dismissal of this action without prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **A Notice of Dismissal form is attached for Petitioner’s convenience.** If Petitioner elects this option, he must file the Notice of Dismissal within 20 days of the date of this Minute Order (by no later than

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**January 10, 2017**). Petitioner is advised that any dismissed claims may later be subject to the statute of limitations under 28 U.S.C. § 2244(d)(1): “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”

**Option 2:** Petitioner may request a voluntary dismissal of the unexhausted claim alleged in the Petition (Ground Four), as identified above, and elect to proceed on only the exhausted claims (Grounds One through Three). If Petitioner elects this option, he must file a notice of withdrawal of the unexhausted claim alleged in the Petition (Ground Four), as identified above, within 20 days of the date of this Minute Order (by no later than **January 10, 2017**). Petitioner is advised that if he elects to proceed solely with the exhausted claims (Grounds One through Three), the Court will not later rule on the unexhausted claim alleged in the Petition (Ground Four), as identified above, even if Petitioner subsequently does exhaust that issue in review by the California Supreme Court. Petitioner is further advised that if he elects to proceed solely with the exhausted claims (Grounds One through Three), any future habeas petition containing his unexhausted claims or other claims that could have been raised in the instant Petition (but were not) may be rejected as successive.

**Option 3:** Petitioner may dismiss the unexhausted claim alleged in the Petition (Ground Four), as identified above, and, pursuant to Kelly, 315 F.3d at 1063, file a motion seeking a stay of his remaining exhausted claims while Petitioner returns to the state courts to exhaust the dismissed claims. If Petitioner elects this option, he must file a declaration, signed under penalty of perjury, selecting a stay pursuant to Kelly,<sup>3</sup> within 20 days of the date of this Minute Order (by **January 10, 2017**). Petitioner is warned, however, that after he has exhausted the unexhausted claim in state court, he will be able to amend his Petition to add the newly exhausted claims only if the exhausted claims (Grounds One through Three) in the Petition are timely and the newly exhausted claim “relat[e] back” to the exhausted claims in the Petition. King v. Ryan, 564 F.3d at 1140–41; Mayle v. Felix, 545 U.S. at 664.

<sup>3</sup> The Court expresses no view regarding whether Petitioner would be entitled to a stay under the standards set forth in Kelly. The Court also expresses no view regarding the timeliness of the Petition or the merits of the claims raised therein.

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**Petitioner is expressly warned that failure to timely file a response to this ORDER may result in a recommendation that this action be dismissed with prejudice for his failure to prosecute and/or obey Court orders pursuant to Federal Rule of Civil Procedure 41(b).**

**Petitioner is further warned that if he does not select one of the three options within the time frames specified above, the Petition will be subject to dismissal as mixed.**

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AF

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER

v.

Plaintiff(s),

Defendant(s).

**NOTICE OF DISMISSAL PURSUANT  
TO FEDERAL RULES OF CIVIL  
PROCEDURE 41(a) or (c)**

PLEASE TAKE NOTICE: (*Check one*)

- This action is dismissed by the Plaintiff(s) in its entirety.
- The Counterclaim brought by Claimant(s) \_\_\_\_\_ is dismissed by Claimant(s) in its entirety.
- The Cross-Claim brought by Claimants(s) \_\_\_\_\_ is dismissed by the Claimant(s) in its entirety.
- The Third-party Claim brought by Claimant(s) \_\_\_\_\_ is dismissed by the Claimant(s) in its entirety.
- ONLY** Defendant(s) \_\_\_\_\_

is/are dismissed from (*check one*)  Complaint,  Counterclaim,  Cross-claim,  Third-Party Claim brought by \_\_\_\_\_.

The dismissal is made pursuant to F.R.Civ.P. 41(a) or (c).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Attorney/Party

**NOTE: F.R.Civ.P. 41(a):** This notice may be filed at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

**F.R.Civ.P. 41(c):** Counterclaims, cross-claims & third-party claims may be dismissed before service of a responsive pleading or prior to the beginning of trial.