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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSE LUIS SOLORZANO,	)	1:08-cv-01949 YNP DLB (HC)
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTION TO STAY
v.	)	[Doc. #14]
	)	
UNKNOWN,	)	
	)	
Respondent.	)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Both parties have consented to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1). (Docs. #12, 21)

On January 30, 2009, Petitioner filed a motion to stay his petition while additional claims are being decided in the state court. (Doc. #14). This order considers whether Petitioner's petition should be stayed until those additional claims are exhausted and the petition can be amended to include them.

**LEGAL STANDARD**

On May 5, 2009, the 9th Circuit Court of Appeals handed down King v. Ryan, 564 F.3d 1133 (9th Cir. 2009), which clearly specified two possible analyses by which to decide a motion to stay. One analysis is Rhines, where, upon a showing of good cause, a petitioner can have his entire petition stayed and placed in abeyance while he exhausts the unexhausted claims in state court. King, 564 F.3d at 1135-36; see also Rhines v. Webber, 544 U.S. 269 (2005). The second analysis is

1 the Kelly three-step procedure. Under Kelly, a petitioner first amends his mixed petition to delete  
2 any unexhausted claims. Next the court will stay and hold in abeyance the amended, and now fully  
3 exhausted, petition while the petitioner exhausts the deleted claims in state court. Finally, the  
4 petitioner amends his stayed petition to re-attach the now fully exhausted claims that he deleted  
5 before. King, 564 F.3d at 1135; Kelly v. Small, 315 F.3d 1063, 1070-71 (9th Cir. 2002).

6 There are two distinct differences between Rhines and Kelly. First, Rhines stays and holds in  
7 abeyance both the exhausted and unexhausted claims where as Kelly requires the petitioner to delete  
8 the unexhausted claims and only stays and holds in abeyance the fully exhausted petition. This is an  
9 important distinction because under Kelly a petitioner would still have to amend to re-allege his  
10 deleted claims within the original one year statute of limitation set forth by the Anti-Terrorism and  
11 Effective Death Penalty Act of 1996. King, 564 F.3d at 1138-39; 28 U.S.C. § 2244(d)(1). In other  
12 words, the statute of limitations may run on the dismissed claims while the petitioner proceeds in  
13 state court. A Rhines petitioner, however, would not have to worry about the statute of limitation  
14 because his unexhausted claims would not have left federal court. King, 564 F.3d at 1139, 1140  
15 (citing Rhines, 544 U.S. at 277).

16 The second difference between the two analyses is that Rhines requires a showing of good  
17 cause, while Kelly does not. King, 564 F.3d at 1140. Even though Kelly does not require a showing  
18 of good cause, the Court was clear that the “district courts retain the same degree of discretion they  
19 had before Rhines to implement the Kelly procedure...” King, 564 F.3d at 1141.

## 20 DISCUSSION

21 Petitioner seeks to stay his petition while he exhausts several new claims in state court.  
22 These claims are as follows: (1) against Petitioner’s objections, the district attorney presented a video  
23 tape at trial that was a cleaned up version of the original because the original was blurry; (2) a juror  
24 was falling asleep during the trial and admitted to taking cold medicine. Petitioner wanted to move  
25 for a new jury at the time of sentencing but his appointed counsel refused to do so; (3) Petitioner  
26 saw one of the jurors talking to one of the victims/witnesses in the hallway even though the jurors all  
27 said they did not know any of the victims or witnesses; (4) during a recess, Petitioner was placed in  
28 handcuffs after the jury left, however one of the jurors came back in to the courtroom and saw

1 Petitioner in the handcuffs; (5) inadequate assistance of trial counsel; and (6) ineffective assistance  
2 of appellate counsel for failing to raise issues on appeal and failing to communicate with Petitioner.  
3 In his motion, Petitioner claims that he has good cause for not exhausting these claims because he  
4 did not know how to seek review in federal court. Petitioner also asserts that he does not have  
5 enough access to the prison law library and that he has a learning disability and must therefore rely  
6 on the “kindness of fellow inmates” to assist him with the preparation of his petition. Petitioner only  
7 makes complaints but does not specify how they caused him such a delay in asserting the claims in  
8 question. These alleged obstacles cannot be per se the reason that Petitioner has not exhausted these  
9 claims seeing as how he found a way to bring thirteen other claims in his original petition. Because  
10 he has not stated good cause for failing to exhaust these new claims and bring them in the original  
11 petition, Petitioner’s Rhines argument fails.

12 Petitioner also cites to the Kelly three-step procedure in his motion to stay. While Kelly does  
13 not require good cause, it is at the Court’s discretion to allow a petitioner to use the three-step  
14 process. Of the claims mentioned above, three of them are already listed in the original petition:  
15 claim (1) is the same as ground 13 in the original petition, claim (3) is the same as ground 12 in the  
16 original petition, and claim (5) is the same as ground 10 in the original petition. It would be against  
17 the interest of judicial economy to stay a petition so that more of the same could be exhausted in  
18 state court. As for the remaining claims, claims (2), (4), and (6), they should have been brought to  
19 the State’s high court with original thirteen claims. Now that an answer has been filed, it would be  
20 particularly cumbersome on the Respondent if the Court were to permit Petitioner to start amending  
21 the petition to add claims that were arbitrarily omitted from the original petition. It is for these  
22 reasons that the Court chooses not to exercise its discretion to stay this petition.

23 **ORDER**

24 Accordingly, it is hereby ordered that Petitioner’s motion to stay is DENIED.

25

26 IT IS SO ORDERED.

27

**Dated: August 19, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE

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