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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

A.D. WEBB,	) 1:11-cv-00331-SMS-HC
	)
Petitioner,	) ORDER GRANTING PETITIONER'S
	) MOTION TO AMEND THE PETITION TO
v.	) WITHDRAW UNEXHAUSTED CLAIMS
	) (DOC. 6)
	)
RANDY GROUNDS, Warden,	) ORDER GRANTING PETITIONER'S
	) MOTION FOR STAY AND ABEYANCE
Respondent.	) (DOC. 6)
	)
_____	) ORDER DIRECTING PETITIONER TO
	) FILE STATUS REPORTS EVERY THIRTY
	) (30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on March 18, 2011 (doc. 5). Pending before the Court is Petitioner's motion to withdraw unexhausted claims and to stay the proceedings on the fully exhausted claims pending exhaustion of state court remedies, which was filed on March 18, 2011.

1           I. Motion to Withdraw Unexhausted Claims

2           Although Petitioner's first three claims relating to the  
3 evidence supporting his conviction appear to be exhausted,  
4 Petitioner admitted that his fourth and fifth claims concerning  
5 the allegedly ineffective assistance of trial counsel and his  
6 "Three Strikes" sentence were unexhausted. In response to the  
7 Court's order of March 4, 2011, Petitioner moved in accordance  
8 with the Court's order to withdraw the unexhausted claims and to  
9 stay the proceedings on the fully exhausted claims pending  
10 exhaustion of state court remedies.

11           Accordingly, Petitioner's motion to amend the petition to  
12 withdraw the unexhausted claims will be granted.

13           II. Motion for Stay of the Proceedings

14           Petitioner moves to stay the petition pursuant to Kelly v.  
15 Small, 315 F.3d 1063 (9th Cir. 2003).

16           A district court has discretion to stay a petition which it  
17 may validly consider on the merits. Rhines v. Weber, 544 U.S.  
18 269, 276 (2005); King v. Ryan, 564 F.3d 1133, 1138-39 (9th Cir.  
19 2009). A petition may be stayed either under Rhines, or under  
20 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). King v. Ryan, 564  
21 F.3d 1133, 1138-41 (9th Cir. 2009).

22           In the three-step procedure under Kelly, 1) the petitioner  
23 files an amended petition deleting the unexhausted claims; 2) the  
24 district court stays and holds in abeyance the fully exhausted  
25 petition; and 3) the petitioner later amends the petition to  
26 include the newly exhausted claims. See, King v. Ryan, 564 F.3d  
27 1133, 1135 (9th Cir. 2009). However, the amendment is only  
28 allowed if the additional claims are timely. Id. at 1140-41.

1 In this case, Petitioner meets the qualifications for a  
2 Kelly stay. The petition contained two unexhausted claims which  
3 have been withdrawn. Thus, the instant petition is already  
4 exhausted, and the first step of the Kelly procedure is complete.

5 Therefore, the Court will stay the proceedings according to  
6 the second step of the Kelly procedure. Petitioner will be  
7 instructed to file status reports of his progress through the  
8 state courts. Once the California Supreme Court renders its  
9 opinion, provided the opinion is a denial of relief, Petitioner  
10 must file an amended petition including all of his exhausted  
11 claims. He is forewarned that claims may be precluded as  
12 untimely if they do not comport with the statute of limitations  
13 set forth in 28 U.S.C. § 2244(d).

14 III. Disposition

15 Accordingly, it is ORDERED that:

16 1) Petitioner's motion to amend the petition to withdraw  
17 the unexhausted claims is GRANTED; and

18 2) Petitioner's motion for stay of the proceedings is  
19 GRANTED pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir.  
20 2003); and

21 3) The proceedings are STAYED pending exhaustion of state  
22 remedies; and

23 4) Petitioner is DIRECTED to file a status report of his  
24 progress in the state courts within thirty (30) days, and then  
25 every thirty (30) days thereafter until exhaustion is complete;  
26 and

27 5) Within thirty (30) days after the final order of the  
28 California Supreme Court, Petitioner MUST FILE an amended

1 petition in this Court including all exhausted claims.

2       Petitioner is forewarned that failure to comply with this  
3 Order will result in the Court's vacating the stay.

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5 IT IS SO ORDERED.

6 **Dated: July 26, 2011**

**/s/ Sandra M. Snyder**  
UNITED STATES MAGISTRATE JUDGE

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