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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ISIDRO CASTRO,	) 1:11-cv-00441-SKO-HC
	)
Petitioner,	) ORDER DISCHARGING ORDERS TO SHOW
	) CAUSE (DOCS. 5, 7)
	)
v.	) ORDER DENYING REQUEST FOR A STAY
	) PURSUANT TO <u>RHINES V. WEBER</u>
B. M. CASH, Warden,	) (DOC. 19)
	)
Respondent.	) ORDER GRANTING PETITIONER'S
	) MOTION TO AMEND THE PETITION TO
	) WITHDRAW UNEXHAUSTED CLAIMS
	) (DOC. 19)

ORDER GRANTING PETITIONER'S  
MOTION FOR A KELLY STAY (DOC. 19)

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

1 a signed writing filed by Petitioner on August 12, 2011 (doc.  
2 13). Pending before the Court is Petitioner's request to  
3 withdraw unexhausted claims, filed on December 6, 2011.

4 I. Discharging the Orders to Show Cause

5 Petitioner has responded to the Court's orders to show cause  
6 regarding dismissal for failure to exhaust state court remedies  
7 and for failure to comply with an order of the Court. As a  
8 result, the orders to show cause that issued on March 28, 2011,  
9 and May 17, 2011, will be discharged.

10 II. Background

11 Petitioner alleged that he was an inmate of the California  
12 State Prison at Lancaster, California, serving a sentence of  
13 seventeen (17) years to life imposed in the Kern County Superior  
14 Court upon Petitioner's conviction after jury trial of having  
15 violated Cal. Pen. Code §§ 459, 288(A)(c)(2), 273, and 273.6(A).  
16 (Pet. 1.) Petitioner raises the following claims concerning the  
17 proceedings in the trial court: 1) erroneous or incomplete  
18 instructions concerning consideration of prior acts of misconduct  
19 violated Petitioner's right to due process of law under the  
20 Fourteenth Amendment (pet 9, 18-26); 2) the evidence of  
21 Petitioner's intent to commit oral copulation at the time of  
22 entry of the structure was insufficient to support a conviction  
23 of burglary, and thus Petitioner's right to due process of law  
24 under the Fourteenth Amendment was violated (id. at 27-31); 3)  
25 entry of the livingroom from the bedroom of a single family  
26 residence with the intent to commit forcible oral copulation was  
27 not sufficient to support a conviction of burglary in violation  
28 of Cal. Pen. Code § 459 (id. at 31-38); and 4) trial counsel's

1 sleeping through an unspecified portion or portions of the  
2 proceedings violated Petitioner's right to the effective  
3 assistance of counsel.

4 Although Petitioner alleged that he had exhausted state  
5 court remedies as to the first three claims, Petitioner has not  
6 exhausted his state court remedies as to the fourth claim  
7 concerning counsel's sleeping.

8 On August 19, 2011, the Court denied without prejudice a  
9 motion for a stay of the proceedings for purposes of exhaustion  
10 that Petitioner had denominated a motion for an extension of  
11 time. The basis of the denial was a lack of information.  
12 Petitioner was informed that the denial was without prejudice to  
13 seeking a stay concerning specified claims. On November 22,  
14 2011, the Court issued an order concluding that Petitioner had  
15 not exhausted his state court remedies as to his fourth claim  
16 concerning the ineffective assistance of counsel. The Court  
17 informed Petitioner of the pertinent law regarding exhaustion of  
18 state court remedies. The Court further informed Petitioner that  
19 the Court could not consider his "mixed" petition (i.e., a  
20 petition containing both exhausted and unexhausted claims), and  
21 Petitioner was directed to withdraw the unexhausted claim and  
22 proceed with the unexhausted claims, or have the petition  
23 dismissed without prejudice as a mixed petition. (Doc. 18, 6-  
24 10.)

25 III. Motion to Withdraw Unexhausted Claims

26 On December 6, 2011, Petitioner filed a document stating he  
27 had filed a petition for writ of habeas corpus in the California  
28 Supreme Court, and he further represented that he was ignorant of

1 the law, found law library staff to be unavailable, had been in  
2 the hospital for a few weeks, and did not find it that easy to  
3 file paperwork on time. Petitioner stated the following:

4       Anyhow, I don't understand anything but there's any  
5       way if I first get the opinion from the Supreme Court  
6       and the decision.

7       If not then I would like to file a motion to withdraw  
8       the unexhausted claim concerning the ineffective  
9       assistance of trial counsel.

10 (Doc. 19, 2-3.) The Court interprets this language to mean that  
11 Petitioner would prefer to have the proceedings stayed until the  
12 California Supreme Court acts on a petition he states he has  
13 filed there.

14           A. Request for a Stay of the Proceedings

15       Petitioner's statement of preference for a stay and his  
16 articulation of the circumstances concerning his filing of  
17 paperwork can be construed as a motion for a stay based on a  
18 showing of good cause pursuant to Rhines v. Weber, 544 U.S. 269  
19 (2005).

20       A district court has discretion to stay a petition which it  
21 may validly consider on the merits. Rhines v. Weber, 544 U.S.  
22 269, 276; King v. Ryan, 564 F.3d 1133, 1138-39 (9th Cir. 2009).  
23 A petition may be stayed either under Rhines, or under Kelly v.  
24 Small, 315 F.3d 1063 (9th Cir. 2003). King v. Ryan, 564 F.3d  
25 1133, 1138-41 (9th Cir. 2009).

26       Under Rhines, the Court has discretion to stay proceedings;  
27 however, this discretion is circumscribed by the Antiterrorism  
28 and Effective Death Penalty Act of 1996 (AEDPA). Rhines, 544  
U.S. at 276-77. In light of AEDPA's objectives, "stay and  
abeyance [is] available only in limited circumstances" and "is

1 only appropriate when the district court determines there was  
2 good cause for the petitioner's failure to exhaust his claims  
3 first in state court." Id. at 277-78.

4 A petition may also be stayed pursuant to the procedure set  
5 forth by the Ninth Circuit in Kelly v. Small, 315 F.3d 1063 (9th  
6 Cir. 2003). Under this three-step procedure: 1) the petitioner  
7 files an amended petition deleting the unexhausted claims; 2) the  
8 district court stays and holds in abeyance the fully exhausted  
9 petition; and 3) the petitioner later amends the petition to  
10 include the newly exhausted claims. See, King v. Ryan, 564 F.3d  
11 1133, 1135 (9th Cir. 2009). However, the amendment is only  
12 allowed if the additional claims are timely. Id. at 1140-41.

13 A stay pursuant to Rhines should be available only in the  
14 limited circumstances where it is shown that 1) there was good  
15 cause for the failure to have first exhausted the claims in state  
16 court, 2) the claim or claims at issue potentially have merit,  
17 and 3) there has been no indication that the petitioner has been  
18 intentionally dilatory in pursuing the litigation. Rhines, 544  
19 U.S. at 277-78.

20 In view of the limited record before the Court at this stage  
21 of the proceedings, the Court cannot conclude that Petitioner's  
22 claim concerning the allegedly ineffective assistance of counsel  
23 is without merit. Further, it does not necessarily appear that  
24 Petitioner has been intentionally dilatory.

25 With respect to good cause, Petitioner alleges that he is  
26 ignorant of the law, did not have access to law library staff,  
27 and was placed in a hospital for a few weeks. Petitioner does  
28 not specify the time period of his hospitalization.

1           The Supreme Court has not articulated what constitutes good  
2 cause under Rhines, but it has stated that “[a] petitioner's  
3 reasonable confusion about whether a state filing would be timely  
4 will ordinarily constitute ‘good cause’ for him to file” a  
5 “protective” petition in federal court. Pace v. DiGuglielmo, 544  
6 U.S. 408, 416 (2005). The Ninth Circuit has held that the  
7 standard is a less stringent one than that for good cause to  
8 establish equitable tolling, which requires that extraordinary  
9 circumstances beyond a petitioner's control be the proximate  
10 cause of any delay. Jackson v. Roe, 425 F.3d 654, 661-62 (9th  
11 Cir. 2005). The Ninth Circuit has recognized, however, that “a  
12 stay-and-abeyance should be available only in limited  
13 circumstances.” Id. at 661 (internal quotation marks omitted);  
14 see, Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008),  
15 cert. denied, --- U.S. ----, 129 S.Ct. 2771, 174 L.Ed.2d 276  
16 (2009) (concluding that a petitioner's impression that counsel  
17 had exhausted a claim did not demonstrate good cause).

18           Here, Petitioner asserts that as a result of his ignorance  
19 of the law and generally limited access to law library staff, he  
20 had difficulty in filing papers. However, these circumstances  
21 are everyday realities in the lives of prisoners. If  
22 Petitioner's assertions are considered to qualify as good cause,  
23 then a Rhines stay would be available in virtually every case in  
24 which a petitioner was ignorant of the law or without counsel to  
25 represent him with respect to discretionary, post-conviction  
26 proceedings. This would run counter to the directions in Rhines  
27 and Wooten that stays be available only in limited circumstances.

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1 Further, Petitioner does not give any specific information  
2 concerning his hospitalization, so he has not established that it  
3 affected his ability to exhaust his state court remedies as to  
4 his claim, which concerned trial counsel and thus was apparent to  
5 Petitioner by the end of the trial court proceedings.

6 Accordingly, as Petitioner has not established good cause,  
7 he has not demonstrated his entitlement to a stay under Rhines v.  
8 Weber, 544 U.S. 269, 277-78 (2005).

9 B. Withdrawal of the Unexhausted Claim

10 Because Petitioner has failed to show good cause for a stay,  
11 the Court concludes that Petitioner's preferred option of a stay  
12 of the entire petition pending exhaustion is not possible.

13 Although Petitioner's motion to withdraw the unexhausted  
14 claim was conditional, the condition, namely, a Rhines-type stay,  
15 cannot be met. Thus, Petitioner's request to withdraw the  
16 unexhausted claim concerning the ineffective assistance of  
17 counsel becomes operative.

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

25 In this case, Petitioner meets the qualifications for a  
26 Kelly stay. The petition contained one unexhausted claim which  
27 has been withdrawn. Thus, the instant petition now appears to be  
28 fully exhausted, and the first step of the Kelly procedure is

1 complete.

2           Therefore, the Court will stay the proceedings according to  
3 the second step of the Kelly procedure. Petitioner will be  
4 instructed to file status reports regarding his progress through  
5 the state courts. Once the California Supreme Court renders its  
6 opinion, provided the opinion is a denial of relief, Petitioner  
7 must file an amended petition including all of his exhausted  
8 claims. He is forewarned that claims may be precluded as  
9 untimely if they do not comport with the statute of limitations  
10 set forth in 28 U.S.C. § 2244(d).<sup>1</sup>

11           IV. Disposition

12           Accordingly, it is ORDERED that:

13           1) The orders to show cause that issued on March 28, 2011,  
14 and May 17, 2011, are DISCHARGED; and

15           2) Petitioner's motion to stay the proceedings pursuant to  
16 Rhines v. Weber is DENIED; and

17           3) Petitioner's motion to amend the petition to withdraw  
18 the unexhausted claim concerning ineffective assistance of trial  
19 counsel based on counsel's sleeping is GRANTED; and

20           4) Petitioner's motion for stay of the proceedings is  
21 GRANTED pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir.  
22 2003); and

23           5) The proceedings are STAYED pending exhaustion of state  
24 remedies; and

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25  
26           <sup>1</sup>It is unclear whether Petitioner will have sufficient time to be able  
27 to exhaust his unexhausted claims. However, no statute of limitations  
28 protection is imparted in a King/Kelly stay, nor are the exhausted claims  
adjudicated in this Court during the pendency of such a stay. Further, the  
undersigned is not making any determination at this time that Petitioner can  
timely exhaust any claims prior to the expiration of the statute of  
limitations.



1           6) Petitioner is DIRECTED to file a status report regarding  
2 his progress in the state courts within thirty (30) days, and  
3 then every thirty (30) days thereafter until exhaustion is  
4 complete; and

5           7) Within thirty (30) days after the final order of the  
6 California Supreme Court, Petitioner MUST FILE an amended  
7 petition in this Court including all exhausted claims.

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

10  
11 IT IS SO ORDERED.

12 **Dated: January 3, 2012**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**