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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

STEIN HEATH COLE,

 Petitioner,

 v.

J. LIZARRAGA, Warden,

 Respondent.

Case No. 1:14-cv-01205-LJO-BAM-HC

ORDER GRANTING IN PART PETITIONER'S
MOTION FOR A STAY OF THE
PROCEEDINGS (DOC. 14)

ORDER STAYING THE ACTION PURSUANT
TO KELLY V. SMALL PENDING FURTHER
ORDER OF THE COURT

ORDER DIRECTING PETITIONER TO FILE
PERIODIC STATUS REPORTS

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. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 303.

Pending before the Court is Petitioner's motion for a stay of the proceedings to permit exhaustion of state court remedies as to additional claims, which was filed on October 1, 2014. Respondent filed opposition on October 29, 2014. Petitioner filed a reply on December 1, 2014.

In the initial petition filed on July 21, 2014, Petitioner challenges criminal convictions, alleging claims of due process

1 violations based on admission of evidence of prior bad acts,
2 insufficient evidence of great bodily injury and of attempt to
3 dissuade a witness, and multiple punishment. He also contends that
4 his rights under the Fourteenth Amendment and the Apprendi case were
5 violated by punishment on multiple counts based on a single course
6 of conduct. In the motion for a stay, Petitioner states that he
7 intends to exhaust state court remedies as to claims generally
8 described as double jeopardy, ineffective assistance of appellate
9 counsel related to a lost transcript, and due process violations
10 based on prosecutorial misconduct, failure to disclose material
11 exculpatory evidence, and a biased tribunal. (Doc. 14 at 2-3.)

12 I. Motion for a Stay

13 Petitioner seeks a stay pursuant to both Rhines v. Weber, 544
14 U.S. 269, 276 (2005) and Kelly v. Small, 315 F.3d 1063 (9th Cir.
15 2003).

16 A. Legal Standards

17 A district court has discretion to stay a petition which it may
18 validly consider on the merits. Rhines v. Weber, 544 U.S. at 276;
19 King v. Ryan, 564 F.3d 1133, 1138-39 (9th Cir. 2009), cert. den.,
20 558 U.S. 887. A petition may be stayed either under Rhines, or
21 under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). King v. Ryan,
22 564 F.3d at 1138-41.

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

1 petitioner's failure to exhaust his claims first in state court."
2 Id. at 277-78. A stay of a mixed petition pursuant to Rhines is
3 required only if 1) the petitioner has good cause for his failure to
4 exhaust his claims in state court; 2) the unexhausted claims are
5 potentially meritorious; and 3) there is no indication that the
6 petitioner intentionally engaged in dilatory litigation tactics.
7 Id.

8 A petition may also be stayed pursuant to the procedure set
9 forth by the Ninth Circuit in Kelly v. Small, 315 F.3d 1063 (9th
10 Cir. 2003). Under this three-step procedure: 1) the petitioner
11 files an amended petition deleting the unexhausted claims; 2) the
12 district court stays and holds in abeyance the fully exhausted
13 petition; and 3) the petitioner later amends the petition to include
14 the newly exhausted claims. See, King v. Ryan, 564 F.3d 1133, 1135
15 (9th Cir. 2009). However, the amendment is only allowed if the
16 additional claims are timely. Id. at 1140-41.

17 A stay under Rhines permits a district court to stay a mixed
18 petition and does not require that unexhausted claims be dismissed
19 while the petitioner attempts to exhaust them in state court. In
20 contrast, a stay pursuant to the three-step Kelly procedure allows a
21 district court to stay a fully exhausted petition, and it requires
22 that any unexhausted claims be dismissed. Jackson v. Roe, 425 F.3d
23 654, 661 (9th Cir. 2005). In this circuit it is recognized that the
24 Kelly procedure remains available after the decision in Rhines and
25 is available without a showing of good cause. King v. Ryan, 564
26 F.3d at 1140.

27 B. Analysis

28 The Supreme Court has not articulated what constitutes good

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

16 Recently the Ninth Circuit Court of Appeals found that the
17 district court had abused its discretion in deciding that the Rhines
18 good cause standard was not satisfied where a \$ 2254 petitioner
19 provided argument and supporting evidence that his appellate counsel
20 was ineffective in failing to investigate and raise the ineffective
21 assistance of counsel (IAC) at trial for trial counsel's failure to
22 present significant mitigating evidence at the penalty phase of a
23 capital case. Blake v. Baker, 745 F.3d 977 (9th Cir. 2014), cert.
24 den. Baker v. Blake, 135 S.Ct. 128 (Oct 06, 2014). The Court in
25 Blake stated the following regarding the good cause standard:

26 The good cause element is the equitable component of the
27 Rhines test. It ensures that a stay and abeyance is
28 available only to those petitioners who have a legitimate
reason for failing to exhaust a claim in state court. As
such, good cause turns on whether the petitioner can set

1 forth a reasonable excuse, supported by sufficient
2 evidence, to justify that failure. See Pace, 544 U.S. at
3 416, 125 S.Ct. 1807 (“A petitioner's reasonable
4 confusion... will ordinarily constitute ‘good cause’
5 [under Rhines]....” (emphasis added)). (Footnote
6 omitted.) An assertion of good cause without evidentiary
7 support will not typically amount to a reasonable excuse
8 justifying a petitioner's failure to exhaust. In Wooten,
9 for example, the petitioner's excuse that he was “under
10 the impression” that his claim was exhausted was not a
11 reasonable excuse because no evidence indicated that the
12 petitioner's ignorance was justified. To the contrary, the
13 petitioner's attorney sent him a copy of his state
14 petition, which did not mention the unexhausted claim, and
15 the petitioner did not argue that his attorney provided
16 ineffective assistance for failing to include the claim.
17 540 F.3d at 1024 n. 2; see also King v. Ryan, 564 F.3d
18 1133, 1138 (9th Cir.2009) (holding that the district court
19 did not abuse its discretion in finding that the
20 petitioner did not establish good cause when his factual
21 allegations were “insufficiently detailed”).
22

23 While a bald assertion cannot amount to a showing of good
24 cause, a reasonable excuse, supported by evidence to
25 justify a petitioner's failure to exhaust, will.

26 Id. at 982.

27 Here, Petitioner has not shown good cause for a stay.
28 Petitioner makes general allegations that he discovered new evidence
29 or that transcripts were lost, but Petitioner does not provide
30 specific details regarding the substance, timing, or significance of
31 his belated discoveries. Petitioner has not provided sufficiently
32 detailed evidence of a reasonable excuse.

33 Although Respondent argues that some of Petitioner's
34 contentions in the initial petition were unexhausted in some
35 respects, Respondent answers Petitioner's initial contentions on the
36 merits in the answer (doc. 13), and no motion to dismiss is pending
37 before the Court. At this point, the Court will consider the

1 petition to be substantially exhausted and will grant a stay
2 pursuant to Kelly v. Small.

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

10 II. Disposition

11 In accordance with the foregoing, it is ORDERED that:

12 1) Petitioner's motion for a stay of the proceedings IS GRANTED
13 IN PART, and Petitioner is GRANTED a stay pursuant to Kelly v.
14 Small, 315 F.3d 1063 (9th Cir. 2003); and

15 2) The proceedings are STAYED pending exhaustion of state
16 remedies or further order of the Court; and

17 3) Petitioner is DIRECTED to file an initial status report of
18 his progress in the state courts no later than sixty (60) days after
19 the date of service of this order, and then to file periodic status
20 reports every ninety (90) days thereafter until exhaustion is
21 complete; and

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