

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY BAILEY-BANKS,
Petitioner,

v.

W.L. MONTGOMERY,
Respondent.

1:15-cv-01839-AWI-MJS (HC)
**FINDINGS AND RECOMMENDATIONS TO
DENY PETITIONER’S MOTION TO STAY
AND ABEY PETITION**

(ECF NOS. 27; 28)

FOURTEEN DAY OBJECTIONS DEADLINE

Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his June 7, 2012 conviction for robbery, burglary, accessory after the fact, and receiving stolen property. (ECF No. 1.) He raises eight grounds for review in the petition: (1) Federal violation of confrontation rights; (2) Prosecutorial misconduct; (3) Prejudicial jury instructions; (4) Jury misconduct; (5) Accessory after the fact and principal to the same felony act; (6) Ineffective assistance of counsel; (7) Failure to instruct jury on lesser included offense; and (8) Failure to prove prior strike. (ECF No. 1 at 5-7.)

The Court conducted a preliminary review of the petition and ordered Respondent to file a response. (ECF No. 10.) On May 12, 2016, Respondent filed an answer. (ECF No. 21.) On July 31, 2017, Petitioner filed a motion to stay and abey the petition while he

1 exhausted additional claims in state court. (ECF Nos. 27; 28.)¹ Respondent opposes this
2 motion. (ECF No. 29.)

3 For the reasons outlined below, the Court recommends² that the motion to stay be
4 denied without prejudice.

5 **I. Motion to Stay**

6 Petitioner's brief motion states, in full:

7 I would like to stay and abey Federal Petition Case # (1:15cv01839-AWI-
8 MJS HC) I [am] currently . . . exhausting claims in Superior Court case
9 #HC015533A.

10 Rhines v. Weber, [544 U.S. 269] (2005) permits this Court to stay the
instant petition while Petitioner exhausts his claims in the state courts.

11 (ECF Nos. 27; 28.)

12 Respondent opposes the motion on the ground that Petitioner's brief motion omits
13 the obligation under Rhines to demonstrate good cause for the delayed presentation of
14 the claims to the state court. (ECF No. 29.)

15 Petitioner did not file a reply in support of the motion or provide any additional
16 information concerning this motion.

17 **A. Stay and Abeyance Procedures**

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

22 Under Rhines, the Court has discretion to stay proceedings; however, this
23

24 ¹ Petitioner filed two identical documents on the same day requesting a stay. (ECF Nos.
27; 28.)

25 ² The Ninth Circuit has found that "a motion to stay and abey section 2254 proceedings'
26 to exhaust claims 'is generally (but not always) dispositive of the unexhausted claims,'" and that Magistrate judge must present findings and recommendations to a District Court Judge, rather than rule on the motion. Bastidas v. Chappell, 791 F.3d 1155, 1163 (9th Cir. 2015); Mitchell v. Valenzuela, 791 F.3d 1166, 1173-74 (9th Cir. 2015). Accordingly,
27 the undersigned is issuing findings and recommendations, as opposed to an Order.
28

1 discretion is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996
2 (“AEDPA”). Rhines, 544 U.S. at 276–77. In light of AEDPA's objectives, “stay and
3 abeyance [is] available only in limited circumstances” and “is only appropriate when the
4 district court determines there was good cause for the petitioner's failure to exhaust his
5 claims first in state court.” Id. at 277–78. A stay of a mixed petition pursuant to Rhines is
6 required only if (1) the petitioner has good cause for his failure to exhaust his claims in
7 state court; (2) the unexhausted claims are potentially meritorious; and (3) there is no
8 indication that the petitioner intentionally engaged in dilatory litigation tactics. Id.

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

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

23 **B. Discussion**

24 Petitioner moves to stay this petition under Rhines. (ECF Nos. 27; 28.) However,
25 the motion, as filed, is inadequate for this Court to grant Petitioner such relief. A stay of a
26 mixed petition pursuant to Rhines is required only if (1) the petitioner has good cause for
27 his failure to exhaust his claims in state court; (2) the unexhausted claims are potentially
28 meritorious; and (3) there is no indication that the petitioner intentionally engaged in

1 dilatory litigation tactics. Rhines, 544 U.S. at 277-78. Petitioner’s motion does not
2 attempt to demonstrate good cause for his failure to exhaust, nor does it state which
3 claim or claims³ he is exhausting in state court. (ECF Nos. 27; 28.) Thus, as filed, the
4 Court cannot determine whether there is good cause to stay or whether the unexhausted
5 claim or claims is meritorious. Thus, the motion for a Rhines stay must be denied.

6 However, the Court will recommend that Petitioner be granted the opportunity to
7 refile this motion pursuant to either Rhines or Kelly, addressing the above deficiencies.

8 The Court notes that “the Kelly procedure . . . is not premised upon a showing of
9 good cause.” King, 564 F.3d at 1140. However, “[a] petitioner seeking to use the Kelly
10 procedure will be able to amend his unexhausted claims back into his federal petition
11 once he has exhausted them only if those claims are determined to be timely” under the
12 Antiterrorism and Effective Death Penalty Act of 1996’s (AEDPA) statute of limitations.⁴
13 King, 564 at 1140–41. Thus, the Kelly procedure, in contrast to the Rhines procedure,
14 does not protect a petitioner’s unexhausted claims from expiring during a stay and
15 becoming time-barred in federal court. King, 564 F.3d at 1140–41; see also Duncan v.
16 Walker, 533 U.S. 167, 172-75 (2001) (unlike the filing of a state habeas petition, the
17 filing of a federal habeas petition does not toll AEDPA’s statute of limitations). “[T]he
18 Kelly procedure, unlike the Rhines procedure, does nothing to protect a petitioner’s
19 unexhausted claims from untimeliness in the interim.” King, 564 F.3d at 1141.

20 If a newly exhausted claim is time-barred, it may be added in an amended petition
21 only if it “relates back” to petitioner’s original exhausted claims. However, a new claim

22 ³ A review of the petition indicates that the eighth claim -- failure to prove prior strike --
23 has not been raised before state courts. (ECF No. 1 at 7.) Whether this is the claim that
24 Petitioner seeks a stay for is uncertain, since the motion does not state this. Additionally,
the motion indicates that Petitioner is currently exhausting multiple “claims.” (Id.)

25 ⁴ AEDPA’s limitation period is calculated from the “latest” of four commencement dates.
26 See 28 U.S.C. § 2244(d)(1)(A) (date on which the judgment became final); §
27 2244(d)(1)(B) (date on which the illegal state-action impediment to filing was removed); §
28 2244(d)(1)(C) (date on which the asserted constitutional right was initially recognized by
the U.S. Supreme Court and made retroactive to cases on collateral review); and §
2244(d)(1)(D) (date on which the factual predicate of the claim could have been
discovered through due diligence).

1 does not “relate back” to the original petition simply because it arises from “the same
2 trial, conviction, or sentence.” Mayle v. Felix, 545 U.S. 644, 662-64 (2005). Rather, the
3 new claim must be of the same “time and type” as the original exhausted claims, and
4 share a “common core of operative facts” with those claims. Id. at 659.

5 The decisions in both Kelly and Rhines “are directed at solving the same
6 problem—namely, the interplay between AEDPA’s one-year statute of limitations and the
7 total exhaustion requirement first articulated in Rose v. Lundy, 455 U.S. 509 (1982).”
8 King, 564 F.3d at 1136.

9 **II. Conclusion and Recommendations**

10 For the foregoing reasons, IT IS HEREBY RECOMMENDED that Petitioner’s
11 motion to stay (ECF Nos. 27; 28) be DENIED with leave to refile.

12 These Findings and Recommendations will be submitted to the United States
13 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
14 636(b)(1). Within **fourteen (14) days** after being served with these Findings and
15 Recommendations, the parties may file written objections with the Court. The document
16 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.”
17 The parties are advised that failure to file objections within the specified time may result
18 in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
19 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20
21 IT IS SO ORDERED.

22 Dated: December 29, 2017

/s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28