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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GREGORY EUGENE BISEL,

Petitioner,

v.

RAY FISHER, JR., Warden, and SCOTT
KERNAN, Secretary, California
Department of Corrections and
Rehabilitation

Respondent.

Case No. 1:17-cv-00013-SKO HC

ORDER DIRECTING PETITIONER TO
SUPPLEMENT HIS MOTION FOR
STAY AND ABEYANCE

(Doc. 2)

Petitioner Gregory Eugene Bisel is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 16, 2016, Petitioner filed the petition, setting forth two fully exhausted claims, and moved for an order of stay and abeyance pending exhaustion of additional, unexhausted claims, including ineffective assistance of appellate counsel.

I. Procedural Background

In Fresno County (California) Superior Court, a jury convicted Petitioner of two counts of annoying or molesting a minor child following a prior felony conviction, contrary to California Penal Code § 647.6(c)(2). The court sentenced Petitioner to a prison term of 15 years, 8 months.

Petitioner pursued a direct appeal, alleging constitutional claims relating to the late

1 discovery of a recorded police interview with the victim and denial of Petitioner's right to represent
2 himself (*Faretta v. California*, 422 U.S. 806 (1975)). The California Court of Appeal affirmed
3 Petitioner's conviction on August 10, 2016. The California Supreme Court denied the petition for
4 review on October 19, 2016.

5 **II. Standards for Orders of Stay and Abeyance**

6 A federal district court may not address a petition for writ of habeas corpus unless the
7 petitioner has exhausted state remedies with respect to each claim raised. *Rose v. Lundy*, 455 U.S.
8 509, 515 (1982). A petition is fully exhausted when the highest state court has had a full and fair
9 opportunity to consider all claims before the petitioner presents them to the federal court. *Picard v.*
10 *Connor*, 404 U.S. 270, 276 (1971). "[P]etitioners who come to federal courts with 'mixed' petitions
11 run the risk of forever losing their opportunity for federal review of the unexhausted claims. *Rhines*
12 *v. Weber*, 544 U.S. 269, 275 (2005).

13
14 Federal district courts should stay mixed petitions only in limited circumstances. *Id.* at 277.
15 A district court may stay a mixed petition if (1) the petitioner demonstrates good cause for failing to
16 have first exhausted all claims in state court; (2) the claims potentially have merit; and (3) petitioner
17 has not been dilatory in pursuing the litigation. *Id.* at 277-78.

18
19 In the alternative, a court may stay a mixed petition if (1) the petitioner amends his petition
20 to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended, fully
21 exhausted petition, allowing the petitioner to proceed to exhaust the deleted claims in state court;
22 and (3) petitioner later amends his petition and reattaches the newly exhausted claims to the
23 original petition. *Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir. 2003). The *Kelly* procedure is
24 riskier than the *Rhines* procedure since it does not protect the petitioner's unexhausted claims from
25 expiring during the stay. *King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir. 2009).

26
27 Despite the risk of the unexhausted claims becoming time-barred in the course of the *Kelly*
28

1 procedure, a petitioner may elect to use that alternative since it does not require him to demonstrate
2 good cause as *Rhines* does. *King*, 564 F.3d at 1140. Since Petitioner seeks a stay pursuant to
3 *Rhines*, and the Court concludes that Petitioner has demonstrated good cause for his failure to
4 exhaust his additional claims, it will analyze Petitioner's motion using the *Rhines* alternative.

5 *Rhines* does not define what constitutes good cause for failure to exhaust, and the Ninth
6 Circuit has provided no clear guidance beyond holding that the test is less stringent than an
7 "extraordinary circumstances" standard. *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). If
8 the claims are not "plainly meritless," and if the delays are not intentional or attributable to abusive
9 tactics, however, the *Rhines* court opined that a district court would abuse its discretion in denying
10 a stay. 544 U.S. at 278.

11
12 Petitioner claims generally that appellate counsel declined to pursue several constitutional
13 claims in the direct appeal and indicates that he also intends to allege a claim of ineffective
14 assistance of appellate counsel. To enable the Court to evaluate whether the claims potentially have
15 merit, as required by *Rhines*, Petitioner must provide the Court with a supplemental declaration
16 listing the claims for which he seeks a stay pending their exhaustion.

17
18 **III. Conclusion and Order**

19 The Court hereby DIRECTS Petitioner to file, within thirty (30) days of the date of this
20 Order, a supplemental statement setting forth each unexhausted claim for which he seeks a stay to
21 permit exhaustion. If Petitioner fails to comply with this Order, the Court will deny the stay, and
22 permit the petition to move forward on the two exhausted claims currently alleged in it.

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24
25 IT IS SO ORDERED.

26 Dated: January 13, 2017

27 /s/ Sheila K. Oberto
28 UNITED STATES MAGISTRATE JUDGE