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

TOMMY HENDERSON,

Petitioner,

No. CIV S-09-2189 DAD P

vs.

MICHAEL MARTEL,

Respondent.

ORDER

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Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In accordance with the court’s August 14, 2009 order, petitioner has paid the filing fee. Petitioner has also filed a one-page motion for a stay and abeyance.

BACKGROUND

On August 7, 2009, petitioner commenced this action by filing a petition for writ of habeas corpus. Therein, petitioner challenges his 2006 judgment of conviction entered in the Sacramento County Superior Court. He asserts seven claims for relief. (Pet. at 5 & Attach.)

In his brief motion for a stay and abeyance, petitioner acknowledges that his petition is a “mixed” petition because his first, fourth, and fifth claims are unexhausted.

Petitioner explains that his attorney failed to raise these issues on direct appeal. He also explains

1 that his attorney raised his claim arising under Cunningham v. California, 549 U.S. 270 (2007)
2 on direct appeal at the California Court of Appeal. However, petitioner states that his attorney
3 failed to raise the same issue before the California Supreme Court. According to petitioner, the
4 statute of limitations for his filing of a federal habeas petition will expire on October 16, 2009,
5 and therefore the granting of a stay and abeyance is now necessary in this matter. (Mot. for Stay
6 & Abey. at 1.)

7 **STAY AND ABEYANCE PROCEDURES**

8 The United States Court of Appeals for the Ninth Circuit recently analyzed the
9 two procedures available to habeas petitioners who wish to proceed with exhausted and
10 unexhausted claims for relief. See King v. Ryan, 564 F.3d 1133 (9th Cir. 2009). First, the Ninth
11 Circuit explained “the Kelly procedure,” which it had outlined in Kelly v. Small, 315 F.3d 1063
12 (9th Cir. 2003). Under the three-step Kelly procedure,

13 (1) the petitioner amends his petition to delete any unexhausted
14 claims, (2) the court stays and holds in abeyance the amended, fully
15 exhausted petition, allowing petitioner the opportunity to proceed
16 to state court to exhaust the deleted claims, and (3) petitioner later
amends his petition and re-attaches the newly-exhausted claims to
the original petition.

17 King, 564 F.3d at 1135. A petitioner who elects to proceed under the Kelly procedure will be
18 able to amend his petition with his newly exhausted claims if they are timely. If a petitioner’s
19 newly-exhausted claims are untimely, he will only be able to amend his petition to include them
20 if they share a “common core of operative facts” with the claims in his original petition. In this
21 regard, the Kelly procedure, unlike the alternative procedure discussed below, is a riskier one for
22 a habeas petitioner because it does not protect a petitioner’s unexhausted claims from expiring
23 during a stay. See King, 564 F.3d at 1140-41. See also Duncan v. Walker, 533 U.S. 167, 172-75
24 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas petition does not
25 toll the statute of limitations).

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1 As the Ninth Circuit explained in King, the United States Supreme Court has
2 authorized an alternative procedure which it outlined in Rhines v. Weber, 544 U.S. 269, 277
3 (2005). Under the Rhines procedure, the petitioner need not amend his petition to delete
4 unexhausted claims. Instead, the petitioner may proceed on a “mixed petition,” and his
5 unexhausted claims remain pending in federal court while he returns to state court to exhaust
6 them. See King, 564 F.3d at 1140; Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines
7 concluded that a district court has discretion to stay a mixed petition to allow a petitioner time to
8 return to state court to present unexhausted claims.”). A petitioner who elects to proceed under
9 the Rhines procedure can, in many instances, avoid an issue with respect to the timeliness of his
10 petition. See King, 564 F.3d at 1140. However, the Supreme Court cautioned that a “stay and
11 abeyance [under the Rhines procedure] should be available only in limited circumstances,” and
12 “district courts should place reasonable time limits on a petitioner’s trip to state court and back.”
13 Rhines, 544 U.S. at 277-78. The Supreme Court explained that district courts should not grant a
14 stay if the petitioner has engaged in abusive litigation tactics or intentional delay or if the
15 unexhausted claims are plainly meritless. Id. at 278. In addition, federal proceedings may not be
16 stayed indefinitely and reasonable time limits must be imposed on a petitioner’s return to state
17 court to exhaust additional claims. Id. at 277-78.

18 **DISCUSSION**

19 Based on petitioner’s filing of a “mixed” petition as well as petitioner’s concern
20 about the federal statute of limitations, the court has construed petitioner’s motion for a stay and
21 abeyance as a motion under the Rhines procedure outlined by the United States Supreme Court.

22 Petitioner’s concern regarding the expiration of the federal statute of limitations is
23 well taken. However, based on the information he has provided to the court in his motion for a
24 stay and abeyance, it is not clear that the granting of a stay and abeyance is appropriate in this
25 case. In this regard, petitioner’s motion for a stay and abeyance does not provide sufficient facts
26 and information to satisfy the requirements of Rhines. The court is unable to determine whether

