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

GORDON JAMES WRIGHT,

Petitioner,

No. CIV S-09-2543 FCD DAD P

vs.

J. HAMLET, Warden,

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 September 16, 2009 order, petitioner has filed an application to proceed in forma pauperis. Petitioner has also filed a one-page motion for a stay and abeyance.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

**BACKGROUND**

On September 10, 2009, petitioner commenced this action by filing a petition for writ of habeas corpus. Therein, petitioner challenges his 2007 judgment of conviction entered in the Shasta County Superior Court, asserting five grounds for habeas relief. (Pet. at 5 & Attach.)

1 In his brief motion for a stay and abeyance, petitioner asks the court to “stay/toll  
2 time on his federal petition for writ of habeas corpus on all grounds.” He further asks the court  
3 to “[s]tay any further proceedings until such a time that all issues raised in state habeas petition  
4 have been completely exhausted at all state levels.” Petitioner notes that he has included all of  
5 his claims for relief in the petition pending before this court. (Mot. for Stay & Abey. at 1.)

### 6 **STAY AND ABEYANCE PROCEDURES**

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

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

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

25 As the Ninth Circuit explained in King, the United States Supreme Court has  
26 authorized an alternative procedure which it outlined in Rhines v. Weber, 544 U.S. 269, 277

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

## 16 **DISCUSSION**

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

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

1 action, whether petitioner's unexhausted claims are potentially meritorious, or whether petitioner  
2 has been diligent in pursuing his unexhausted claims. See Taylor, 134 F.3d at 987 n.8 & n.11  
3 (failure to show diligence in pursuing claims may foreclose the granting of a stay). Accordingly,  
4 the court will deny petitioner's motion without prejudice to the filing of a renewed motion for a  
5 stay and abeyance within thirty days.

6 Petitioner is advised that any renewed motion for a stay and abeyance must:

7 (1) show good cause for petitioner's failure to exhaust all claims before filing this action; (2)  
8 demonstrate why each of petitioner's unexhausted claims is potentially meritorious; (3) describe  
9 the status of any state court proceedings on the unexhausted claims; and (4) demonstrate that  
10 petitioner has acted diligently in pursuing his unexhausted claims.

#### 11 **OTHER MATTERS**

12 Petitioner has also filed a motion for a court order requiring the trust account  
13 office at the Correctional Training Facility at Soledad to complete his application to proceed in  
14 forma pauperis. The court will deny petitioner's motion as moot. As noted above, the court has  
15 received and will grant petitioner's application to proceed in forma pauperis.

#### 16 **CONCLUSION**

17 In accordance with the above, IT IS HEREBY ORDERED that:

- 18 1. Petitioner's September 24, 2009 application to proceed in forma pauperis  
19 (Doc. No. 5) is granted;
- 20 2. Petitioner's September 10, 2009 motion for a stay and abeyance (Doc. No. 2) is  
21 denied without prejudice;
- 22 3. Petitioner is granted thirty days from the date of service of this order in which  
23 to file a renewed motion for a stay and abeyance addressing the issues set forth above; and

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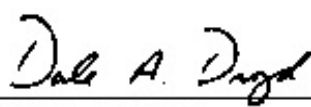
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4. Petitioner's October 7, 2009 motion for a court order (Doc. No. 9) is denied as moot.

DATED: October 26, 2009.

  
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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

DAD:9  
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