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

ALLEN SOLIS,

Petitioner,

No. CIV S-10-0637 FCD DAD P

vs.

MIKE McDONALD,

Respondent.

ORDER

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Petitioner, a state prisoner proceeding pro se, is seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner’s second amended petition, filed in accordance with the court’s June 1, 2010 order dismissing his first amended petition with leave to amend. In that order the court observed that it was unable to determine whether petitioner had exhausted his claims by presenting them to the California Supreme Court prior to filing this federal habeas action.

In general, a federal court will not grant a state prisoner’s application for a writ of habeas corpus unless “the applicant has exhausted the remedies available [to him] in the courts of the State.” 28 U.S.C. § 2254(b)(1). A federal petitioner satisfies the exhaustion requirement by fairly presenting to the highest state court all federal claims before presenting them to the federal court. See Baldwin v. Reese, 541 U.S. 27, 29 (2004); Wooten v. Kirkland, 540 F.3d 1019, 1025

1 (9th Cir. 2008). A federal claim is fairly presented in this regard if the petitioner has described  
2 the operative facts and the federal legal theory upon which his claims is based. See Wooten, 540  
3 F.3d at 1025; Lounsbury v. Thompson, 374 F.3d 785, 787 (9th Cir. 2004).

4           Upon reviewing the second amended petition, the court has determined that it  
5 contains both exhausted and unexhausted claims and is therefore “mixed.” Specifically,  
6 petitioner’s first claim that he received ineffective assistance of counsel (Pet. at 5-6) has not  
7 been fairly presented to the California Supreme Court. In contrast, petitioner’s second claim,  
8 wherein he challenges the sufficiency of the evidence introduced at his trial (Pet. at 3-6), has  
9 been exhausted.<sup>1</sup> Because his second amended petition is “mixed,” petitioner may proceed in  
10 one of the following ways: (1) he may elect to file a motion for a stay and abeyance in this court  
11 and return to state court to exhaust his unexhausted claim; (2) he may elect to abandon his  
12 unexhausted claim and proceed solely on his exhausted claim in this court; or (3) he may move to  
13 voluntarily dismiss this action and, after exhausting his first claim by presenting it to the  
14 California Supreme Court, file a new federal petition presenting all his claims.

15           As noted, petitioner may elect to seek a stay and abeyance order to allow him to  
16 return to state court to exhaust his unexhausted claims. The Ninth Circuit has analyzed the two  
17 procedures available to habeas petitioners who wish to proceed with exhausted and unexhausted  
18 claims for relief. See King v. Ryan, 564 F.3d 1133 (9th Cir. 2009). First, the Ninth Circuit  
19 explained “the Kelly procedure,” which it had originally outlined in Kelly v. Small, 315 F.3d  
20 1063 (9th Cir. 2003). Under the three-step Kelly procedure,

21                   (1) the petitioner amends his petition to delete any unexhausted  
22                   claims, (2) the court stays and holds in abeyance the amended, fully  
23                   exhausted petition, allowing petitioner the opportunity to proceed  
24                   to state court to exhaust the deleted claims, and (3) petitioner later

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25 <sup>1</sup> Petitioner alleges that his second ground for relief has not been presented to the highest  
26 state court. (Pet. at 6.) However, he indicates to the contrary in another section of his petition.  
(See Pet. at 3.) The court has referred to the California Supreme Court’s website, and it appears  
that petitioner has exhausted this claim. (See Case No. S160222.)

1 amends his petition and re-attaches the newly-exhausted claims to  
2 the original petition.

3 King, 564 F.3d at 1135. A petitioner who elects to proceed under the Kelly procedure will be  
4 able to amend his petition with his newly exhausted claims if they are timely. If a petitioner’s  
5 newly-exhausted claims are untimely, he will only be able to amend his petition to include them  
6 if they share a “common core of operative facts” with the claims in his original petition. In this  
7 regard, the Kelly procedure, unlike the alternative procedure discussed below, is a riskier one for  
8 a habeas petitioner because it does not protect a petitioner’s unexhausted claims from expiring  
9 during a stay. See King, 564 F.3d at 1140-41; see also Duncan v. Walker, 533 U.S. 167, 172-75  
10 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas petition does not  
11 toll the statute of limitations).

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

1 federal proceedings may not be stayed indefinitely and reasonable time limits must be imposed  
2 on a petitioner's return to state court to exhaust additional claims. Id. at 277-78. Thus, in  
3 seeking stay and abeyance under the Rhines procedure, petitioner's motion must: (1) show good  
4 cause for his failure to exhaust all his claims before filing this action; (2) explain and  
5 demonstrate how his unexhausted claim is potentially meritorious; (3) describe the status of any  
6 pending state court proceedings on his unexhausted claim; and (4) explain how he has diligently  
7 pursued his unexhausted claim. Id. at 277-78.

8           Second, petitioner may elect to abandon the unexhausted claims set forth in his  
9 petition before this court without seeking a stay and abeyance order and proceed solely on his one  
10 exhausted claim. If petitioner wishes to proceed in this manner he must file a third amended  
11 petition containing only his exhausted claim. The third amended petition must bear the docket  
12 number assigned to this case and must be labeled "Third Amended Petition." The court,  
13 however, cautions petitioner that if he elects to proceed in this way, he will risk forfeiting future  
14 consideration of his unexhausted claims. See McCleskey v. Zant, 499 U.S. 467 (1991); see also  
15 Rule 9(b), Rules Governing Section 2254 Cases.

16           Finally, petitioner may move to voluntarily dismiss this action and complete  
17 exhaustion of his unexhausted claims and then file a new federal petition presenting all of his  
18 exhausted claims. Petitioner is advised, however, that if he chooses this option, any future  
19 federal petition for writ of habeas corpus may very well be time barred. The habeas corpus  
20 statute imposes a one-year statute of limitations for filing non-capital habeas corpus petitions in  
21 federal court. In most cases, the one year period will start to run on the date on which the state  
22 court judgment became final by the conclusion of direct review or the expiration of time for  
23 seeking direct review, although the statute of limitations is tolled while a properly filed  
24 application for state post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d).

25           In accordance with the above, IT IS HEREBY ORDERED that within thirty days  
26 of the date of this order, petitioner shall inform the court how he intends to proceed by filing a

1 motion for a stay and abeyance, a third amended petition, or a motion to voluntarily dismiss this  
2 action. Failure to comply with this order will result in the court recommending that this action be  
3 dismissed without prejudice.

4 DATED: July 29, 2010.

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8 DALE A. DROZD  
9 UNITED STATES MAGISTRATE JUDGE

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