

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

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

_____ /

Petitioner, a state prisoner proceeding pro se, is seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. By order filed July 30, 2010, the court determined that petitioner’s second amended petition contains exhausted and unexhausted claims and is therefore “mixed.” Accordingly, the court advised petitioner that he could proceed by: (1) filing a motion for a stay and abeyance under the Kelly procedure; (2) filing a motion for a stay and abeyance under the Rhines procedure; (3) abandoning his unexhausted claims, while proceeding on his exhausted claims; or (4) voluntarily dismissing this action. On September 2, 2010, petitioner moved to stay this action. Petitioner, however, has not indicated in his motion whether he wishes to proceed by the Kelly or the Rhines procedure.

As the court thoroughly explained in its previous order, the Ninth Circuit has analyzed the two procedures available to habeas petitioners who wish to proceed with exhausted

1 and unexhausted claims for relief. See King v. Ryan, 564 F.3d 1133 (9th Cir. 2009). First, the
2 Ninth Circuit explained “the Kelly procedure,” which it had originally outlined in Kelly v. Small,
3 315 F.3d 1063 (9th Cir. 2003). Under the three-step Kelly procedure,

4 (1) the petitioner amends his petition to delete any unexhausted
5 claims, (2) the court stays and holds in abeyance the amended, fully
6 exhausted petition, allowing petitioner the opportunity to proceed
7 to state court to exhaust the deleted claims, and (3) petitioner later
8 amends his petition and re-attaches the newly-exhausted claims to
9 the original petition.

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

19 As the Ninth Circuit explained in King, the United States Supreme Court has
20 authorized an alternative procedure which it outlined in Rhines v. Weber, 544 U.S. 269, 277
21 (2005). Under the Rhines procedure, the petitioner need not amend his petition to delete
22 unexhausted claims. Instead, the petitioner may proceed on a “mixed petition,” and his
23 unexhausted claims remain pending in federal court while he returns to state court to exhaust
24 them. See King, 564 F.3d at 1140; Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines
25 concluded that a district court has discretion to stay a mixed petition to allow a petitioner time to
26 return to state court to present unexhausted claims.”). A petitioner who elects to proceed under
the Rhines procedure can, in many instances, avoid an issue with respect to the timeliness of his
federal petition. See King, 564 F.3d at 1140. However, the United States Supreme Court

1 cautioned that a “stay and abeyance [under the Rhines procedure] should be available only in
2 limited circumstances,” and “district courts should place reasonable time limits on a petitioner’s
3 trip to state court and back.” Rhines, 544 U.S. at 277-78. The Supreme Court explained that
4 district courts should not grant a stay if the petitioner has engaged in abusive litigation tactics or
5 intentional delay or if the unexhausted claims are plainly meritless. Id. at 278. In addition,
6 federal proceedings may not be stayed indefinitely and reasonable time limits must be imposed
7 on a petitioner’s return to state court to exhaust additional claims. Id. at 277-78. Thus, in
8 seeking stay and abeyance under the Rhines procedure, petitioner’s motion must: (1) show good
9 cause for his failure to exhaust all his claims before filing this action; (2) explain and
10 demonstrate how his unexhausted claim is potentially meritorious; (3) describe the status of any
11 pending state court proceedings on his unexhausted claim; and (4) explain how he has diligently
12 pursued his unexhausted claim. Id. at 277-78.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Petitioner’s September 2, 2010 motion to stay this case (Doc. No. 14) is denied
15 as incomplete;

16 2. Within twenty-eight days of the date of this order, petitioner shall file a
17 renewed motion for a stay and abeyance that explicitly indicates whether he wishes to proceed
18 under the Kelly or Rhines procedure; and

19 3. If petitioner elects to proceed under the Rhines procedure, in his renewed
20 motion for a stay and abeyance he must also: (1) show good cause for his failure to exhaust all
21 his claims before filing this action; (2) explain and demonstrate how his unexhausted claim is

22 ////

23 ////

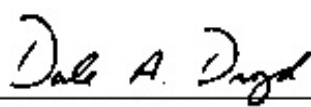
24 ////

25 ////

26 ////

1 potentially meritorious; (3) describe the status of any pending state court proceedings on his
2 unexhausted claim; and (4) explain how he has diligently pursued his unexhausted claim.

3 DATED: September 8, 2010.

4
5 
6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

7 DAD:sj
8 soli0637.osc.2

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26