

1 explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3). A petitioner satisfies the exhaustion
2 requirement by providing the highest state court with a full and fair opportunity to consider all
3 claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971);
4 Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

5 Petitioner does not require leave of this court to file a petition in the California Supreme Court.

6 When a federal petition contains both exhausted and unexhausted claims (a so-called
7 "mixed petition"), it may under some circumstances be stayed pending further exhaustion. A
8 federal habeas court may stay a mixed petition and hold it in abeyance pursuant to Rhines v.
9 Weber, 544 U.S. 269 (1995). Under Rhines, stay and abeyance are available only where (1) good
10 cause is shown for petitioner's failure to have first exhausted the claims in state court, (2) the
11 claim or claims at issue potentially have merit, and (3) there has been no indication that petitioner
12 has been intentionally dilatory in pursuing the litigation. Rhines, 544 U.S. at 277-78.

13 The Ninth Circuit provides an alternative stay procedure that requires withdrawal of the
14 unexhausted claims. See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing three-step
15 procedure of Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003)). Under Kelly, the court may stay a
16 petition containing only exhausted claims while allowing the petitioner to proceed to state court
17 to exhaust additional claims. Id. (citing Kelly, 315 F.3d at 1070). Once the additional claims
18 have been exhausted, the petitioner may amend his petition to add them back to the petition. This
19 procedure does not require a showing of cause, but presents the possibility that petitioner's claims
20 may be time-barred for federal purposes once they are exhausted. Id. at 1135, 1140. The court
21 may deny a request for stay under Kelly if it is clear that newly-exhausted claims would be time-
22 barred. See id. at 1141.

23 This court will consider a stay under either Rhines or Kelly only pursuant to written
24 motion. Any such motion must specify the exhausted and unexhausted claims, identify the legal
25 basis for the requested stay, and make the showing required by the governing law. If petitioner
26 does not move for a stay and the petition is in fact mixed, the petition will be subject to dismissal
27 on respondent's motion following service.

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

1. Petitioner shall submit, within thirty days from the date of this order, an affidavit in support of his request to proceed in forma pauperis or the appropriate filing fee;

2. The Clerk of the Court is directed to send petitioner a copy of the in forma pauperis form used by this district;

3. If petitioner seeks a stay pending exhaustion of unexhausted claims, he must file a motion for a stay and abeyance within thirty days, in accordance with the appropriate procedure.

DATED: October 25, 2013


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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