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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERMAINE BARKLEY,
Petitioner,
v.
JOE LIZARRAGA,
Respondent.

No. 2:15-cv-0655 AC P

ORDER

Petitioner is a state prisoner at Mule Creek State Prison who proceeds pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. By order filed May 12, 2015, this court noted that the petition, ECF No. 5, appeared to be timely filed based on the following two claims, which appeared to be fully exhausted in the state courts: (1) the denial of petitioner’s right to fully confront and cross-examine a witness, and (2) the ineffective assistance of trial counsel for failure to request that the jury be instructed on voluntary intoxication as a defense to the charge (and conviction) that petitioner made a criminal threat. See ECF No. 8. The court denied without prejudice petitioner’s second motion¹ to stay this action pending the exhaustion of further claims in the state courts.

In denying petitioner’s motion to stay, the court noted that petitioner had failed to identify

¹ Petitioner attempted to commence this action with his first motion to stay. See ECF No. 1.

1 the new claims he intends to exhaust. The court explained the differences between a stay under
2 Rhines v. Weber, 544 U.S. 269, 277 (2005), and a stay under Kelly v. Small, 315 F.3d 1063 (9th
3 Cir. 2003). The court directed petitioner to choose between the following options, ECF No. 8 at
4 4:

5 In order to consider petitioner's request for a stay of this action,
6 petitioner must specifically identify the claims he seeks to exhaust
7 in the state courts, and explain why these claims were not
8 previously exhausted. Petitioner must also articulate whether he is
9 seeking a stay under Kelly or Rhines. If petitioner seeks a stay
under Kelly, he need not file an amended petition; however, if
petitioner seeks a stay under Rhines, he must file an amended
petition that includes his unexhausted claims.

10 Petitioner was accorded twenty-one days within which to file a new motion to stay,
11 subject to these parameters. On May 28, 2015, petitioner timely filed the instant motion.
12 Petitioner states that he seeks a stay under Rhines, but failed to submit an amended petition that
13 includes both his exhausted and unexhausted claims. Petitioner identifies his unexhausted claims
14 as "Brady issues [and] ineffective assistance of the trial counsel [] for not fully and adequately
15 explaining the plea offer . . . , failure to investigate . . . , failure to present evidence . . . , failure to
16 present witnesses . . . , failure to obtain witnesses . . . , Purjury (sic) by an officer, Prosecutor
17 misconduct, and failure to object by trial counsel."² ECF No. 10 at 1-2. Petitioner broadly asserts
18 that these claims became apparent with newly discovered evidence. Petitioner also requests that
19 this court direct staff at Mule Creek State Prison to turn over photos requested by petitioner.

20 Essentially, petitioner seeks carte blanche authorization to pursue in the state courts a
21 laundry list of putative claims while this court maintains a protective filing date for his original
22 federal petition. Petitioner's request conforms neither to Rhines or Kelly. Failure to conform to
23 either standard requires that petitioner's request to stay this action again be denied without
24 prejudice.

25 To proceed under Rhines, petitioner must clearly set forth in a new amended petition both
26 his exhausted and unexhausted claims. The unexhausted claims must be sufficiently alleged to

27 ² This quote deletes repeated references to "trial counsel;" this passage does not further elucidate
28 petitioner's ineffective assistance claims.

1 appear at least potentially cognizable. A stay under Rhines is appropriate only when petitioner
2 has demonstrated good cause for failing to previously exhaust his claims in the state courts, and is
3 not available if the unexhausted claims are “plainly meritless,” or petitioner has engaged in
4 “abusive litigation tactics or intentional delay.” Rhines, 544 U.S. at 277-78.

5 To proceed under Kelly, petitioner must clearly state his intention to do so, but need not
6 file an amended petition at this time. However, while “the Kelly procedure . . . is not premised
7 upon a showing of good cause,” King, 564 F.3d at 1140, petitioner later incorporate his
8 unexhausted claims into his federal petition only if the claims are timely under AEDPA’s statute
9 of limitations, id. at 1140-41, or, if time-barred, “relate back” to petitioner’s originally exhausted
10 claims. Mayle v. Felix, 545 U.S. 644 (2005) (new claim must be of the same “time and type” as
11 the original exhausted claims, and share a “common core of operative facts” with those claims).
12 In addition, a “Kelly stay may be denied where the petitioner’s new claims are deemed to be
13 untimely and do not relate back to exhausted claims,” that is, if “granting such a stay to permit
14 exhaustion . . . would be futile.” Spivey v. Gipson, 2013 WL 4517896, *9, 18 (E.D. Cal. 2013)
15 (citing King, 564 F.3d at 1141-43); see also Figueroa v. Lea, 2014 WL 1028500, * 5 (S.D. Cal.
16 2014) (citing Haskins v. Schriro, 2009 WL 3241836, *3 (D. Ariz. 2009).

17 In a further motion to stay, petitioner must clearly state whether his motion is premised on
18 Rhines or Kelly, and each unexhausted claim must be specifically and clearly identified. If the
19 motion is premised on Rhines, petitioner must explain why he failed to previously exhaust his
20 unexhausted claims in the state courts, and petitioner must also file a separate amended petition
21 that includes both his exhausted and unexhausted claims. On the other hand, if petitioner seeks a
22 stay under Kelly, he need not explain his failure to previously exhaust his unexhausted claims and
23 need not file an amended petition; however, petitioner must still specifically and clearly identify
24 each of his unexhausted claims. **This means that petitioner must not merely state what type
25 of claims he intends to bring, but must provide the claims themselves including the factual
26 basis for each claim.**

27 Accordingly, IT IS HEREBY ORDERED that:

- 28 1. Petitioner’s third motion to stay this action, ECF No. 10, is denied without prejudice.


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2. Within twenty-one (21) days after the filing date of this order, petitioner may file a fourth motion to stay this action, pursuant to the standards and requirements set forth herein.

3. No further opportunities to request a stay of this action, at this juncture, will be authorized; failure of petitioner to timely comply with this order will result in an order directing respondent to file a response to the currently operative petition containing petitioner's exhausted claims, ECF No. 5.

4. The Clerk of Court is directed to send petitioner a blank copy of the form used by prisoners for filing a habeas petition pursuant to 28 U.S.C. § 2254.

DATED: June 9, 2015



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE