1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 EDUARD VLADIMIROV No. 2:15-cv-1204 MCE AC P ANDROSHCHUK, 12 Petitioner, 13 ORDER AND FINDINGS AND RECOMMENDATIONS v. 14 MARTIN BITER, Warden, 15 Respondent. 16 17 Petitioner is a state prisoner proceeding pro se on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Currently before the Court are petitioner's motions for stay and 18 19 extension of time. ECF Nos. 17 and 19. Also pending is respondent's motion to dismiss the 20 petition as untimely. ECF No. 11. 21 I. Motion for Extension of Time On July 26, 2016, petitioner filed a motion for a sixty-day extension of time in order to 22 respond to respondent's opposition to the motion for stay. ECF No. 19. Petitioner's reply to 23 respondent's opposition was due on July 19, 2016. See L.R. 230(1) (the moving party may file a 24 25 reply to the opposition no more than seven days after the opposition has been filed in CM/ECF). 26 Petitioner's motion for an extension of time was filed after the reply was due. The court may, for 27

<sup>&</sup>lt;sup>1</sup> Since petitioner is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988).

good cause, extend the time if a request is made before the original time expires. Rule 12 of the Rules Governing Section 2254; Fed. R. Civ. P. 6(b)(1)(A). The motion for extension was filed after the time to reply, did not establish excusable neglect for the untimely motion, and failed to establish good cause for the lengthy extension requested. The motion for extension is therefore denied.

## II. <u>Motion to Stay</u>

Petitioner filed a motion for stay pursuant to <u>Rhines v. Weber</u>, 544 U.S. 269 (2005), in order to develop and have new evidence tested in state court. ECF No. 17. In the alternative, petitioner moved for an extension of time of ninety days to file an opposition to respondent's motion to dismiss. Id.

District courts have the authority to issue stays where such a stay would be a proper exercise of discretion. Rhines, 544 U.S. at 277. Under Rhines, the district court stays a mixed petition<sup>2</sup> while the petitioner exhausts unexhausted claims in state court. 544 U.S. at 277. Rhines instructs district courts to stay, rather than dismiss, a mixed petition, only "in limited circumstances," namely when three conditions are met: "[(1)] the petitioner had good cause for his failure to exhaust, [(2)] his unexhausted claims are potentially meritorious, and [(3)] there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." 544 U.S. at 277-78.

As an initial matter, respondent argues that there are not any unexhausted claims within the petition (ECF No. 18), and a review of the petition supports that argument (ECF No. 1 at 3-5). Petitioner's "new evidence" appears to relate to Ground One of the petition (<u>id.</u> at 5), which the petition represents is exhausted (<u>id.</u> at 3-4). If the petition contains only exhausted claims, a <u>Rhines</u> stay is unnecessary. If the petition is in fact fully exhausted, then petitioner may seek to stay an exhausted-claims-only petition using the procedure outlined in <u>Kelly v. Small</u>, 315 F.3d 1063 (9th Cir. 2003). "Pursuant to the <u>Kelly</u> procedure, (1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended, fully

<sup>&</sup>lt;sup>2</sup> A "mixed" petition is a single petition that includes both exhausted and unexhausted claims. Mena v. Long, 813 F.3d 907, 908 (9th Cir. 2016).

exhausted petition, allowing the petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his [federal] petition" to reincorporate the newly exhausted claims. King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1070-71). The Kelly stay-and-abeyance procedure does not require a showing of good cause or potential merit. However, using the Kelly procedure means that any newly-exhausted claims later added to the federal petition by amendment must relate back to the claims in the stayed petition; in other words, "the Kelly procedure, unlike the Rhines procedure, does nothing to protect a petitioner's unexhausted claims from untimeliness in the interim." King, 564 F.3d at 1141. The court may deny a request for stay under Kelly if it is clear that newly-exhausted claims would be time-barred. See id. at 1141-42.

Since petitioner has not requested a <u>Kelly</u> stay, the court will not address the issue any further other than to advise petitioner that if he chooses to move for a <u>Kelly</u> stay at a later date, he will need to first establish that newly-exhausted claims would be timely. Failure to do so will result in a recommendation a request for a Kelly stay be denied.

Assuming that the petition is mixed, the court must determine whether the Rhines conditions are satisfied. Petitioner requests a stay in order to have DNA reports analyzed. ECF No. 17. Respondent opposes the motion to stay on the ground that petitioner does not explain how his "new evidence" would excuse his untimely claims. ECF No. 18. Because the evidence has not been analyzed, its significance is currently unknown and there is no way for the court to determine whether petitioner's claims are potentially meritorious. Without a finding that the claims have potential merit, the court cannot grant a Rhines stay.

With respect to respondent's argument that petitioner's new evidence does not address the untimeliness of his petition, it appears that petitioner may be making a claim of actual innocence based on new DNA evidence. ECF No. 1 at 5. However, "petitioner must produce proof of his innocence that is sufficient to convince a federal court that a failure to entertain his claim would constitute a fundamental miscarriage of justice" in order to invoke the actual innocence exception to the statute of limitations. <u>Larsen v. Soto</u>, 742 F.3d 1083, 1096 (9th Cir. 2013) (citing <u>Lee v.</u> Lampert, 653 F.3d 929, 937-38 (9th Cir. 2011).

The Supreme Court held in Schlup v. Delo, 513 U.S. 298, 314-15 (1995), that a habeas petitioner who makes a "colorable claim of factual innocence" that would implicate a "fundamental miscarriage of justice" may be entitled to have "otherwise barred constitutional claim[s] considered on the merits." To invoke the miscarriage of justice exception to AEDPA's statute of limitations, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). This exception is concerned with actual, as opposed to legal, innocence and must be based on reliable evidence not presented at trial. Schlup, 513 U.S. at 324; Calderon v. Thompson, 523 U.S. 538, 559 (1998). To make a credible claim of actual innocence, petitioner must produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324. Here, petitioner has proffered not reliable new evidence, but speculation about the possibility of new evidence. Because petitioner states that the DNA reports have not been analyzed and interpreted, their exculpatory value is unknown and they are insufficient to establish a "colorable claim of factual innocence." Staying the case would therefore be inappropriate, as it is unclear whether the evidence petitioner seeks to pursue would have any bearing on the timeliness of his petition.

Petitioner requests that, if the court does not issue a stay, he be given an extension of time of ninety days in order to file an opposition to the motion to dismiss. ECF No. 17. Petitioner previously requested and was granted two extensions of time to respond to the motion to dismiss. ECF Nos. 14, 16. In the order granting petitioner's first request for extension, he was explicitly reminded that he needed to address respondent's argument that his petition was barred by the statute of limitations. ECF No. 14. In the order granting petitioner a second extension of time, the court informed him that no further extensions of time would be granted absent a showing of extraordinary circumstances. ECF No. 16.

Respondent filed his motion to dismiss on March 10, 2016. ECF No. 11. At the time petitioner filed his motion for stay or extension, he had had over three months in which to file a response to the motion to dismiss. The motion does not made a showing of extraordinary

circumstances or explain what petitioner was doing during those three months, and as noted above it fails to address how the new evidence would overcome respondent's claim that his petition is untimely. Petitioner should have been working on his response during the previously granted extensions. It has now been seven months since respondent filed his motion to dismiss. Petitioner will be granted twenty-one days in which to file his opposition. No further extensions of time will be granted and failure to respond to the motion to dismiss will result in a recommendation that the case be dismissed.

Petitioner is instructed that his response to the motion to dismiss must address the expiration of the statute of limitations alleged by respondent. The court cannot address any arguments on the merits if this action is barred due to the expiration of the statute of limitations.

## III. Summary

Petitioner's motion for an extension of time to reply to the opposition to his motion for stay is denied because it is untimely and does not explain why it is late or why petitioner needs so much time.

It is recommended that petitioner's motion for stay be denied because petitioner's new evidence has not been analyzed yet, so the court cannot determine whether petitioner's claim potentially has merit. It is also denied because petitioner has not shown how the new evidence would overcome respondent's claim that the petition is untimely.

Petitioner's request for an extra ninety days to respond to the motion to dismiss is partially granted. Petitioner will have twenty-one days to file a response and the response must address respondent's claim that his petition is untimely. No further extensions of time will be granted and if petitioner does not file a response to the motion to dismiss the undersigned will recommend this case be dismissed.

## Accordingly, IT IS HEREBY ORDERED that:

- Petitioner's motion for extension of time to reply to respondent's opposition (ECF No.
  is denied.
- 2. Petitioner's motion for a ninety-day extension of time to respond to the motion to dismiss (ECF No. 17) is granted in part. Within twenty one days after the filing date of this order,

petitioner shall file and serve an opposition to respondent's motion to dismiss. No further extensions of time will be granted. Failure to file a response to the motion to dismiss will result in a recommendation that this case be dismissed.

IT IS FURTHER RECOMMENDED that petitioner's motion for stay (ECF No. 17) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 18, 2016

ALLISON CLAIRE

UNITED STATES MAGISTRATE JUDGE