

1 motion for a stay and abeyance. ECF No. 10.

2 In his motion, petitioner states that he seeks a stay under Rhines “for good cause that [he
3 is] exhausting numerous unexhausted issues.” Id. He then states he is exhausting issues “such as
4 no Probable Cause, Malic[i]ous Prosecution, 3 forms of ineffective co[u]nsele,” and “a few other
5 very good issues illegal criminal acts committed to obtain an illegal conviction.” Id. He also
6 states that he does not have access to the law library and does not know how to use a computer.
7 Id.

8 Petitioner was advised that in order to obtain a stay of a petition containing both exhausted
9 and unexhausted claims under Rhines, he must show (1) good cause for his failure to have first
10 exhausted the claims in state court, (2) that the claim or claims at issue potentially have merit, and
11 (3) that he has not been intentionally dilatory in pursuing the litigation. Rhines, 544 U.S. at 277-
12 78. Petitioner appears to argue that the good cause for granting his request for a stay is that he is
13 currently pursuing exhaustion of his state court remedies and that he does not have access to the
14 law library. ECF No. 10. However, the fact that petitioner may be currently pursuing his state
15 court remedies does not establish good cause for not doing so prior to filing his federal habeas
16 petition. It is also not clear from the motion whether petitioner is claiming that he has no access
17 to the law library or that his access is only limited. Nor does he state how long library access has
18 been an issue.

19 With respect to the second Rhines factor, though petitioner lists several issues that he is
20 exhausting, it is unclear whether they potentially have merit, as it appears that at least some of the
21 issues he lists are not currently included in the petition and he has not provided any information
22 about the factual basis for these claims. It does not appear that the petition includes grounds
23 related to probable cause or malicious prosecution, and though there are claims of ineffective
24 assistance of counsel, it is not clear how many, if any, of the “3 forms” referenced by petitioner in
25 his motion are included in the petition. It is also impossible for the court to evaluate any potential
26 merit of the vague claims for “illegal criminal acts.”

27 As for the final Rhines factor, petitioner has not offered any evidence from which the
28 court could determine that he has not been intentionally dilatory in pursuing litigation. Though

1 petitioner alleges limited or non-existent law library access, he offers no additional information as
2 to how long this limitation has existed or what steps he has taken to actively pursue litigation.

3 Finally, on the current record, it is impossible for the court to determine whether the
4 grounds in the petition are completely exhausted, partially exhausted, or not at all exhausted. The
5 status of the issues in the petition is relevant to the type of stay sought. If all the issues in the
6 petition in are exhausted and petitioner is simply seeking to stay the case so that he can exhaust
7 additional claims, then a stay under Kelly would be appropriate rather than a stay under Rhines.³
8 Based on the information provided in the petition, it appears that petitioner may have already
9 exhausted his state remedies as to the claims contained therein (ECF No. 1 at 2-3) and is in fact
10 simply seeking to stay the proceedings so that he may exhaust his state remedies as to additional
11 claims. Alternatively, if the court finds a stay under Rhines is not warranted, the status of the
12 issues in the petition will be relevant to the subsequent action taken in this case.

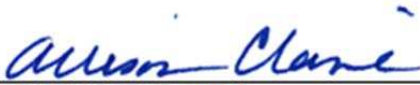
13 For these reasons, petitioner's motion for a stay and abeyance will be denied without
14 prejudice. Petitioner will be given one more opportunity to file a motion for stay in the proper
15 form. The motion must specifically identify which, if any, of the claims within the petition are
16 unexhausted. If the petition does in fact contain both exhausted and unexhausted claims, then
17 petitioner must address each of the Rhines factors if he seeks to have the entire petition stayed
18 pending exhaustion of his state remedies on his unexhausted claims. If all the claims in the
19 petition have already been exhausted, then petitioner must clarify that he is seeking the stay in
20 order to exhaust additional claims that are not currently included in the petition. Regardless of
21 the exhaustion status of the present federal petition, if petitioner intends to exhaust claims that are
22 not included in that petition he must attach them to his motion for a stay.

23 Accordingly, IT IS HEREBY ORDERED that petitioner's motion to stay is denied
24 without prejudice to a motion in proper form. If plaintiff seeks a stay pending exhaustion of
25 ////

26 ³ Under Kelly, the court may stay a petition containing only exhausted claims while allowing the
27 petitioner to proceed to state court to exhaust additional claims which may be added back to the
28 petition by amendment once they are exhausted. King v. Ryan, 564 F.3d 1133, 1135 (9th Cir.
2009) (citing Kelly, 315 F.3d at 1070-71).

1 unexhausted claims, he must file a motion for stay and abeyance within thirty days of the filing of
2 this order. The motion must be in accordance with the appropriate procedures.

3 DATED: August 25, 2015

4 
5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28