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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL JAMES FAULKNER,
Petitioner,
v.
E. VALENZUELA, Warden,
Respondent.

No. 2:15-cv-1485 KJM DAD P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus. Petitioner has paid the filing fee.

THE PETITION

Petitioner commenced this action by filing a petition for writ of habeas corpus challenging his 2013 judgment of conviction entered in the Shasta County Superior Court. Petitioner asserts four claims for relief in his petition but acknowledges that he has not exhausted his grounds three and four with the California Supreme Court. (Pet. at 2 & 6.)

DISCUSSION

Petitioner’s federal habeas corpus petition is a “mixed” petition, containing both exhausted and unexhausted claims. A federal court cannot grant habeas corpus relief on a “mixed” petition. The United States Court of Appeals for the Ninth Circuit has analyzed the two stay and abeyance procedures available to habeas petitioners who wish to proceed with both

1 exhausted and unexhausted claims for relief in federal court. See King v. Ryan, 564 F.3d 1133
2 (9th Cir. 2009). First, the Ninth Circuit explained “the Kelly procedure,” outlined in Kelly v.
3 Small, 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 to
7 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 under the statute of
12 limitations governing the filing of federal habeas petitions.¹ However, if a petitioner’s newly-
13 exhausted claims are untimely, he will only be able to amend his petition to include them if they
14 share a “common core of operative facts” with the claims set forth in his original federal petition.
15 In this regard, the Kelly procedure, unlike the alternative procedure discussed below, is a riskier
16 one for a federal habeas petitioner because it does not protect a petitioner’s unexhausted claims
17 from expiring during a stay. See King, 564 F.3d at 1140-41; see also Duncan v. Walker, 533 U.S.
18 167, 172-75 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas
19 petition does not toll the statute of limitations).

20 As the Ninth Circuit explained in King, the United States Supreme Court has authorized
21 an alternative stay and abeyance procedure which it outlined in Rhines v. Weber, 544 U.S. 269,
22 277 (2005). Under the Rhines procedure, the petitioner need not amend his federal habeas
23 petition to delete unexhausted claims. Instead, the petitioner may proceed on a “mixed petition,”
24 i.e., one containing both exhausted and unexhausted claims; his unexhausted claims remain
25 pending in federal court while he returns to state court to exhaust them. See King, 564 F.3d at
26 1140; Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines concluded that a district court

27 ¹ The habeas corpus statute imposes a one year statute of limitations for filing non-capital habeas
28 corpus petitions in federal court. In most cases, the one year period will start to run on the date
on which the state court judgment became final by the conclusion of direct review or the
expiration of time for seeking direct review, although the statute of limitations is tolled while a
properly filed application for state post-conviction or other collateral review is pending. 28
U.S.C. § 2244(d).

1 has discretion to stay a mixed petition to allow a petitioner time to return to state court to present
2 unexhausted claims.”). A petitioner who elects to proceed under the Rhines procedure can, in
3 many instances, avoid an issue with respect to the timeliness of the claims set forth in his federal
4 petition. See King, 564 F.3d at 1140. However, the Supreme Court has also cautioned that a
5 “stay and abeyance [under the Rhines procedure] should be available only in limited
6 circumstances,” and “district courts should place reasonable time limits on a petitioner’s trip to
7 state court and back.” Rhines, 544 U.S. at 277-78. The Supreme Court explained that district
8 courts should not grant such a stay if the petitioner has engaged in abusive litigation tactics or
9 intentional delay or if the unexhausted claims are plainly meritless. Id. at 278. Further, under
10 Rhines, “stay-and-abeyance is only appropriate when the district court determines there was
11 good cause for the petitioner’s failure to exhaust his claims first in state court.” King, 564 F.3d
12 at 1139 (quoting Rhines, 544 U.S. at 277-78). See also Blake v. Baker, 745 F.3d 977 (9th Cir.
13 2014) (“good cause turns on whether the petitioner can set forth a reasonable excuse, supported
14 by sufficient evidence, to justify that failure. An assertion of good cause without evidentiary
15 support will not typically amount to a reasonable excuse justifying a petitioner’s failure to
16 exhaust”). The decisions in both Kelly and Rhines “are directed at solving the same problem –
17 namely, the interplay between AEDPA’s one-year statute of limitations and the total exhaustion
18 requirement first articulated in Rose v. Lundy, 455 U.S. 509 (1982).” King, 564 F.3d at 1136.

19 Under the circumstances of this case, the court will provide petitioner with an opportunity
20 to file a motion for a stay and abeyance pursuant to either the Kelly procedure or the Rhines
21 procedure.² Alternatively, petitioner may elect to abandon his unexhausted claims without
22 seeking a stay and abeyance order and proceed solely on his exhausted claims. However,
23 petitioner is cautioned that if he chooses to proceed solely on his exhausted claims before this
24 court, he risks forfeiting consideration of the unexhausted claims in this or any other federal

25
26 ² If petitioner elects to file a motion pursuant to the Rhines procedure, his the motion must (1)
27 show good cause for petitioner’s failure to exhaust all claims before filing this action, (2)
28 demonstrate why each of petitioner’s unexhausted claims is potentially meritorious, (3) describe
the status of any state court proceedings on the unexhausted claims, and (4) demonstrate that
petitioner has acted diligently in pursuing his unexhausted claims.

1 court. See McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455 U.S. at 520-21; Rule
2 9(b), 28 U.S.C. foll. § 2254.

3 **CONCLUSION**

4 Accordingly, IT IS HEREBY ORDERED that:

5 1. Within thirty days of the date of service of this order, petitioner shall do one of the
6 following:

7 (a) file a motion for a stay and abeyance pursuant to the Kelly procedure, together
8 with an amended petition that contains only his exhausted claims;

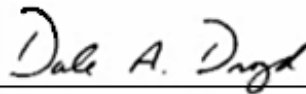
9 (b) file a motion for a stay and abeyance pursuant to the Rhines procedure that
10 demonstrates “good cause” for petitioner’s failure to exhaust his claims in state
11 court; or

12 (c) file an amended habeas petition in this court that contains only petitioner’s
13 exhausted claims with a notice to the court indicating that petitioner is abandoning
14 his unexhausted claims.

15 2. Petitioner’s failure to comply with this order will result in a recommendation that this
16 action be dismissed without prejudice; and

17 3. The Clerk of the Court is directed to send petitioner a blank form used by prisoners in
18 this district to petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

19 Dated: October 8, 2015

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

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