



1 providing the highest state court with a full and fair opportunity to consider all claims before  
2 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.  
3 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

4 The state court has had an opportunity to rule on the merits when the petitioner has fairly  
5 presented the claim to that court. The fair presentation requirement is met where the petitioner  
6 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at  
7 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were  
8 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.  
9 Harless, 459 U.S. 4, 6 (1982). Instead,

10 [i]f state courts are to be given the opportunity to correct alleged  
11 violations of prisoners’ federal rights, they must surely be alerted to  
12 the fact that the prisoners are asserting claims under the United  
13 States Constitution. If a habeas petitioner wishes to claim that an  
evidentiary ruling at a state court trial denied him the due process of  
law guaranteed by the Fourteenth Amendment, he must say so, not  
only in federal court, but in state court.

14 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus  
15 must include reference to a specific federal constitutional guarantee, as well as a statement of the  
16 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152 (1996). The United  
17 States Supreme Court has held that a federal district court may not entertain a petition for habeas  
18 corpus unless the petitioner has exhausted state remedies with respect to each of the claims raised.  
19 Rose v. Lundy, 455 U.S. 509 (1982). A mixed petition containing both exhausted and  
20 unexhausted claims must be dismissed.

21 Here, petitioner raises twelve claims in his petition. (ECF No. 4.) Respondent moves to  
22 dismiss petitioner’s claims one through six, nine, ten and twelve, alleging that petitioner failed to  
23 exhaust his state court remedies as to each of those claims. In his prior motion to stay, petitioner  
24 conceded his failure to exhaust, but did not specifically addressing each claim.

25 After reviewing the record in this action, it appears that because petitioner filed no post-  
26 conviction collateral challenges in state court, he has only exhausted the claims raised in his  
27 petition for review filed in the California Supreme Court: (1) “Petition for review should be  
28 granted to determine the meaning and scope of Penal Code section 267;” (2) “Petition for review

1 should be granted in order to clarify the scope of CALCRIM No. 1190, the non-corroboration [sic]  
2 instruction;” (3) “Petition for review should be granted to determine the due process implication  
3 of improper invocations of procedural default;” (4) “Petition for review should be granted to  
4 determine the scope of Penal Code section 654 on the facts of this case;” and (5) “Petition for  
5 review should be granted to determine the proper manner of having ‘blind’ issues reviewed on  
6 appeal.” (Respondent’s Lodged Document (“LD”) 3.) Respondent argues that only three of the  
7 twelve claims raised in the instant petition are encompassed in claims one, two, four, and five of  
8 the petition for review: claim seven (654 violation); claim eight (jury instructions), and claim  
9 eleven (not being able to impeach witnesses’ credibility). Thus, respondent contends that  
10 petitioner’s federal claims one, two, three, four, five, six, nine, ten, and twelve are not exhausted.  
11 As set forth above, this court may not address the merits of a petition for writ of habeas corpus  
12 unless petitioner has exhausted state court remedies with respect to each of his federal claims.  
13 Rose, 455 U.S. at 509; 28 U.S.C. § 2254(b)(1). However, a habeas petitioner may request that a  
14 federal action be stayed to allow for exhaustion in state court.

15 Federal law recognizes two different procedures that a prisoner may use to stay a federal  
16 habeas action. See Rhines v. Weber, 544 U.S. 269 (2005) (staying timely mixed petition); Kelly  
17 v. Small, 315 F.3d 1063 (9th Cir. 2003) (allowing prisoner to dismiss unexhausted claims and  
18 stay action as to exhausted claims subject to potential later amendment of petition).

19 First, under Rhines, a district court may stay a mixed petition if the following conditions  
20 are met: (1) “the petitioner had good cause for his failure to exhaust,” (2) “his unexhausted  
21 claims are potentially meritorious,” and (3) “there is no indication that the petitioner engaged in  
22 intentionally dilatory litigation tactics.” Id., 544 U.S. at 278. The Supreme Court has made clear  
23 that this option “should be available only in limited circumstances.” Id. at 277. Moreover, a stay  
24 that is granted pursuant to Rhines may not be indefinite; reasonable time limits must be imposed  
25 on a petitioner’s return to state court. Id. at 277-78.

26 “Good cause” under Rhines is not clearly defined. The Supreme Court has explained that  
27 in order to promote the Anti-Terrorism and Effective Death Penalty Act’s (“AEDPA”) twin goals  
28 of encouraging the finality of state judgments and reducing delays in federal habeas review, “stay

1 and abeyance should be available only in limited circumstances.” Rhines, 544 U.S. at 277. The  
2 Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an  
3 “extraordinary circumstances” standard. Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005).  
4 Several district courts have concluded that the standard is more generous than the showing  
5 needed for “cause” to excuse a procedural default. See, e.g., Rhines v. Weber, 408 F. Supp. 2d  
6 844, 849 (D. S.D. 2005) (applying the Supreme Court’s mandate on remand). This view finds  
7 support in Pace, where the Supreme Court acknowledged that a petitioner’s “reasonable  
8 confusion” about the timeliness of his federal petition would generally constitute good cause for  
9 his failure to exhaust state remedies before filing his federal petition. Pace v. DiGuglielmo, 544  
10 U.S. 408, 416-17 (2005). However, in Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008), the  
11 Ninth Circuit ruled that petitioner did not show good cause by arguing that he was “under the  
12 impression” that his counsel had raised all claims before the state court of appeal. Wooten, 540  
13 F.3d at 1024. The Ninth Circuit explained that finding good cause in that argument “would  
14 render stay-and-abey orders routine” and “would run afoul of Rhines and its instruction that  
15 district courts should only stay mixed petitions in ‘limited circumstances.’” Wooten, 540 F.3d at  
16 1024. In 2014, the Ninth Circuit clarified that “[t]he good cause element is the equitable  
17 component of the Rhines test,” and that although “a bald assertion cannot amount to a showing of  
18 good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to exhaust,  
19 will.” Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014).

20         Second, the court may also stay a petition setting forth only exhausted claims, to permit  
21 exhaustion of additional claims with the intention that they will be added by amendment  
22 following exhaustion. King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) (citing Kelly, 315 F.3d at  
23 1063). If the petition currently on file was fully exhausted, petitioner could seek a stay-and-  
24 abeyance order to exhaust claims not raised in that federal petition under Kelly. However, the  
25 Ninth Circuit has warned that “[a] petitioner seeking to use the Kelly procedure will be able to  
26 amend his unexhausted claims back into his federal petition once he has exhausted them only if  
27 those claims are determined to be timely . . . [a]nd demonstrating timeliness will often be  
28 problematic under the now-applicable legal principles.” King, 564 F.3d at 1140-41. If a

1 petitioner's newly-exhausted claims are untimely, he will be able to amend his petition to include  
2 them only if they share a "common core of operative facts" with the claims in the original federal  
3 petition.

4 Unless petitioner seeks to stay this action, the court must dismiss unexhausted claims and  
5 proceed solely as to exhausted claims. If petitioner seeks to choose the Rhines approach, he must  
6 file a motion for stay and address the three Rhines conditions set forth above. If petitioner seeks  
7 to stay this action under Kelly, petitioner must submit an amended petition along with his  
8 renewed motion for stay, taking care to raise only exhausted claims.<sup>2</sup>

9 Finally, respondent contends that allowing petitioner an opportunity to exhaust any  
10 unexhausted claim is futile because the statute of limitations has run. (ECF No. 11 at 4, citing see  
11 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).) Thus, petitioner must address this argument  
12 in his opposition to the motion to dismiss.

13 Petitioner is cautioned that if he fails to respond to this order, the court will grant  
14 respondent's motion to dismiss, dismiss petitioner's unexhausted claims without prejudice, and  
15 this action will proceed solely on exhausted claims.<sup>3</sup>

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

17 1. Within thirty days from the date of this order, petitioner shall file an opposition to  
18 respondent's motion to dismiss petitioner's unexhausted claims, and a motion for stay. If  
19 petitioner seeks to stay this action under Rhines, he must address the three Rhines conditions set  
20 forth above. If petitioner seeks to stay this action under Kelly, petitioner must also submit an

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22 <sup>2</sup> The Kelly approach is riskier for petitioners in that the timeliness of the new claims will depend  
23 on whether they "relate back" to the original, timely filed claims. King, 564 F.3d at 1142, citing  
Mayle v. Felix, 545 U.S. 644 (2005).

24 <sup>3</sup> Petitioner is cautioned that if he chooses to proceed on an amended petition raising only  
25 exhausted claims he will risk forfeiting consideration of the unexhausted claims in this or any  
26 other federal court. See McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455 U.S. at 520-  
21; Rule 9(b), Rules Governing Section 2254 Cases.

27 Petitioner is further advised that a one year statute of limitations is applicable to all claims  
28 presented in a federal habeas corpus petition. See 28 U.S.C. § 2244(d)(1); see also Mardesich v.  
Cate, 668 F.3d 1164 (9th Cir. 2012) (holding that the one year statute of limitations applied to  
each claim in a habeas petition on an individual basis).

1 amended petition, raising only exhausted claims. Failure to file a motion for stay in compliance  
2 with this order will result in an order dismissing petitioner's unexhausted claims, and this action  
3 will proceed solely on petitioner's exhausted claims.

4 2. Petitioner's motion for stay, if any, shall be briefed pursuant to Local Rule 230(1).

5 Dated: May 18, 2016

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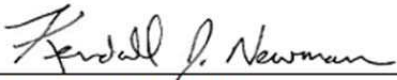
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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE