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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN STEELE,
Petitioner,
v.
JOHN N. KATAVICH, Warden,
Respondent.

No. 2:15-cv-1836 TLN KJN P

ORDER

Petitioner is a state prisoner, proceeding without counsel. On September 12, 2016, petitioner filed a request for an extension of time to file a motion for stay and abeyance. Petitioner contends that he has a torn thoracic nerve resulting in a muscle dying, and has a winged scapula, causing about an 85% loss of functionality in his dominant arm and hand. (ECF No. 25 at 2.) Petitioner alleges that he has had one surgery, but needs another to fix his problem. Petitioner claims that this is his second request for extension of time in which to file a motion to stay.

On December 10, 2015, respondent filed a motion to dismiss the petition based on petitioner’s alleged failure to exhaust state court remedies. (ECF No. 11.) On May 18, 2016, petitioner was provided the standards for filing a motion for stay under Rhines v. Weber, 544 U.S. 269 (2005) (staying timely mixed petition) or Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) (allowing prisoner to dismiss unexhausted claims and stay action as to exhausted claims subject

1 to potential later amendment of petition). (ECF No. 20.) Petitioner was granted thirty days in
2 which to file an opposition to respondent's motion to dismiss petitioner's unexhausted claims,
3 and a motion for stay. On June 27, 2016, petitioner was granted an additional thirty days. (ECF
4 No. 22.) On August 9, 2016, petitioner was granted another thirty day extension, but was warned
5 that no further extensions of time would be granted. (ECF No. 24.)

6 Petitioner has now had over four months in which to file his opposition to the motion to
7 dismiss his unexhausted claims and a motion for stay. Petitioner did not explain when he
8 sustained his nerve injury or when he first underwent surgery. However, he is cautioned that the
9 court will not indefinitely delay resolution of respondent's motion. Indeed, it appears that
10 petitioner concedes the petition contains unexhausted claims inasmuch as he now solely seeks
11 leave to file a motion for stay.¹ As petitioner was advised in the May 18, 2016 order, unless his
12 motion for stay is granted, the court must dismiss the unexhausted claims and proceed solely as to
13 exhausted claims.

14 Thus, petitioner is granted one final opportunity in which to comply with the May 18,
15 2016 order. However, because petitioner has had ample opportunity in which to file his
16 opposition and motion for stay, no further extensions of time will be granted.

17 Accordingly, IT IS HEREBY ORDERED that:

18 1. Petitioner's request for an extension of time (ECF No. 25) is granted.

19 2. Within thirty days from the date of this order, petitioner shall file a motion for stay. If
20 petitioner seeks to stay this action under Rhines, he must address the three Rhines conditions set
21 forth in the May 18, 2016 order. If petitioner seeks to stay this action under Kelly, petitioner
22 must also submit an amended petition, raising only exhausted claims.

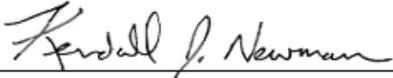
23 3. Failure to file a motion for stay in compliance with this order will result in an order
24 granting respondent's motion to dismiss and dismissing petitioner's unexhausted claims, and this
25 action will proceed solely on petitioner's exhausted claims. No further extensions of time will be
26 granted.

27 _____
28 ¹ Petitioner also appeared to concede his failure to exhaust his state court remedies in his
February 1, 2016 motion to stay. (ECF No. 15.)

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4. Petitioner's motion for stay shall be briefed pursuant to Local Rule 230(l).

Dated: September 15, 2016


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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