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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KELLY LEE BOHANNAN,  
Petitioner,  
v.  
WILLIAM L. MUNIZ,  
Respondent.

No. 2:16-cv-1342 TLN AC P

ORDER

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. See ECF No. 1. Respondent has filed an answer, ECF No. 20; petitioner filed a reply, ECF No. 33. However, prior to filing his substantive reply, petitioner filed a motion to stay this action while he exhausts additional claims in the state courts. See ECF No. 31. For the reasons set forth below, petitioner will be directed to file a supplemental brief informing the court whether his motion to stay this action is made pursuant to Rhines v. Weber, 544 U.S. 269 (2005), or Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003); and respondent will be directed to file a response.

Petitioner seeks a stay of this action under Rhines “and/ or” Kelly. ECF No. 31 at 1. The motion responds to the substance of respondent’s answer to the petition. Petitioner

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1 explains, id. at 2-3:

2           Petitioner has discovered upon review of respondent’s answer to  
3 petition for writ of habeas corpus that petitioner’s first, second, and  
4 fourth claims are non-cognizable state law claims and the only way  
5 to properly remedy [this] . . . is to assert a Sixth Amendment IAC  
6 claim which applies equally to both trial and appellate counsel. . . .  
7 Also, petitioner has now properly submitted Claim [Fourth] [sic]  
8 before the California Supreme Court as upon review of  
9 respondent’s answer it was determined to be unexhausted, therefore  
10 petitioner is attempting to exhaust. . . .

11 Petitioner has attached to his motion a draft copy of his new state habeas corpus petition. See  
12 ECF No. 31 at 11-6 (Ex. A). The state petition identifies the following single ground for relief  
13 (with additional supporting facts), id. at 13:

14           The Sixth and Fourteenth U.S. Constitutional Amendment of the  
15 right to effective assistance of counsel which applies equally to  
16 both trial and appellate counsel. Petitioner’s rights were violated  
17 under the Due Process Clause 6th & 14th U.S. Con. Amendments  
18 and petitioner was prejudiced by counsel’s omissions and  
19 ineffectiveness.

20 This petition was apparently filed in the California Supreme Court on February 20, 2018 and  
21 remains pending as of this writing.<sup>1</sup>

22           In further support of his motion, petitioner has attached a “proposed amended” federal  
23 habeas petition. See ECF No. 31 at 18-46 (Ex. B).<sup>2</sup> Compared with the original petition (ECF  
24 No. 1), the proposed amended petition (ECF No. 31) redesignates prior Claim Three as Claim  
25 Four (cf. ECF No. 1 at 16 and ECF No. 31 at 33), and adds the above new IAC claim as new  
26 Claim Three (see ECF No. 31 at 22). The new claim is set forth only on the form portion of the  
27 proposed amended habeas petition. Id.

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<sup>1</sup> In his motion to stay, filed February 2, 2018, petitioner states that his new state petition is  
“currently pending in the California Supreme Court.” ECF No. 31 at 1. However, review of the  
case information website operated by the California Supreme Court appears to indicate that  
petitioner filed the petition on February 20, 2018, which as of this writing remains pending.

A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d  
500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also  
Fed. R. Evid. 201 (court may take judicial notice of facts that are capable of accurate  
determination by sources whose accuracy cannot reasonably be questioned).

<sup>2</sup> This exhibit, which was paginated upon its recent docketing in this court, includes its original  
pagination when docketed in the Northern District prior to its transfer to this court.

1 The court does not presently address the merits or potential merits of petitioner’s stay  
2 request. Rather, the court informs petitioner that the legal standards and potential consequences  
3 for staying a federal habeas petition under Rhines and Kelly, while petitioner exhausts additional  
4 claims in the state court, are quite different. A Rhines stay is available for a petition that (1) is  
5 “mixed,” that is, containing both exhausted and unexhausted claims, or (2) contains only  
6 unexhausted claims. See Rhines, 544 U.S. at 275-78; see also Mena v. Long, 813 F.3d 907, 910  
7 (9th Cir. 2016). A Rhines stay preserves the federal filing date for unexhausted claims contained  
8 in the federal petition, thus potentially avoiding a statute of limitations challenge. However, to  
9 obtain a stay under Rhines, the petitioner must show that (1) good cause exists for his failure to  
10 earlier exhaust his claim(s) in the state courts, (2) the claim(s) at issue potentially have merit, and  
11 (3) petitioner has not intentionally delayed pursuing the litigation. Rhines, at 544 U.S. at 277-78.

12 Alternatively, a petitioner may seek to stay an exhausted-claims-only petition pursuant to  
13 Kelly. See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (recounting three-step procedure  
14 under Kelly). Under the Kelly procedure, the court may stay a petition containing only exhausted  
15 claims while allowing the petitioner to proceed to state court to exhaust additional claims. The  
16 procedure under Kelly is as follows: “(1) a petitioner amends his petition to delete any  
17 unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted  
18 petition, allowing the petitioner the opportunity to proceed to state court to exhaust the deleted  
19 claims; and (3) the petitioner later amends his [federal] petition” to reincorporate the newly  
20 exhausted claims. King, 564 F.3d at 1139 (citing, inter alia, Kelly, 315 F.3d at 1070-71). The  
21 Kelly procedure does not require petitioner to demonstrate good cause or that the claims have  
22 potential merit. However, using the Kelly procedure means that any newly-exhausted claims later  
23 added to the federal petition by amendment must “relate back” to the claims in the stayed petition  
24 or otherwise satisfy applicable statute of limitations requirements. In other words, “the Kelly  
25 procedure, unlike the Rhines procedure, does nothing to protect a petitioner’s unexhausted claims  
26 from untimeliness in the interim.” King at 1141.

27 Petitioner’s instant motion and proposed amended petition appear to reflect the stay-and-  
28 abeyance procedure under Rhines. However, because petitioner’s motion expressly seeks a stay

1 based on Rhines “and/or” Kelly, demonstrating petitioner’s failure to distinguish the two  
2 procedures, he will be tasked with making a choice in his supplemental brief.

3 In addition, because respondent has filed an answer to the original petition, respondent  
4 will be directed to file a response to petitioner’s supplemental brief addressing any potential  
5 prejudice to respondent should this court grant petitioner’s motion, as well the potential merit of  
6 petitioner’s proffered new claim.


7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Petitioner shall, within twenty-one (21) days after the filing date of this order, file and  
9 serve a supplemental brief informing the court whether petitioner’s motion to stay this action is  
10 made pursuant to Rhines v. Weber, 544 U.S. 269 (2005), or Kelly v. Small, 315 F.3d 1063 (9th  
11 Cir. 2003).

12 2. Within fourteen (14) days after service of petitioner’s supplemental brief, respondent  
13 shall file and serve a response.

14 SO ORDERED.

15 DATED: April 23, 2018

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17 ALLISON CLAIRE  
18 UNITED STATES MAGISTRATE JUDGE  
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