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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY PHILLIP BRADLEY,
Petitioner,
v.
WARDEN SPEARMAN,
Respondent.

No. 2:17-cv-0828 KJN P

ORDER

Petitioner is a state prisoner, proceeding pro se, with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 2, 2017, petitioner filed a document suggesting he filed his habeas petition in the wrong court, and sought information concerning the stay and abeyance procedure.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d

¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

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

8 [i]f state courts are to be given the opportunity to correct alleged
9 violations of prisoners’ federal rights, they must surely be alerted to
10 the fact that the prisoners are asserting claims under the United
11 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.

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

18 Here, if petitioner has claims not yet exhausted in state court, petitioner must decide
19 whether to proceed on his exhausted claims, if any, or he must file a motion for stay that
20 identifies the type of stay he seeks. Federal law recognizes two different procedures that a
21 prisoner may use to stay a federal habeas action. See Rhines v. Weber, 544 U.S. 269 (2005)
22 (staying timely mixed petition); Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) (allowing prisoner
23 to dismiss unexhausted claims and stay action as to exhausted claims subject to potential later
24 amendment of petition).

25 First, under Rhines, a district court may stay a mixed petition if the following conditions
26 are met: (1) “the petitioner had good cause for his failure to exhaust;” (2) “his unexhausted
27 claims are potentially meritorious;” and (3) “there is no indication that the petitioner engaged in
28 intentionally dilatory litigation tactics.” Id., 544 U.S. at 278. The Supreme Court has made clear

1 that this option “should be available only in limited circumstances.” Id. at 277. Moreover, a stay
2 that is granted pursuant to Rhines may not be indefinite; reasonable time limits must be imposed
3 on a petitioner’s return to state court. Id. at 277-78.

4 “Good cause” under Rhines is not clearly defined. The Supreme Court has explained that
5 in order to promote the Anti-Terrorism and Effective Death Penalty Act’s (“AEDPA”) twin goals
6 of encouraging the finality of state judgments and reducing delays in federal habeas review, “stay
7 and abeyance should be available only in limited circumstances.” Rhines, 544 U.S. at 277. The
8 Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an
9 “extraordinary circumstances” standard. Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005).
10 Several district courts have concluded that the standard is more generous than the showing
11 needed for “cause” to excuse a procedural default. See, e.g., Rhines v. Weber, 408 F. Supp. 2d
12 844, 849 (D. S.D. 2005) (applying the Supreme Court’s mandate on remand). This view finds
13 support in Pace, where the Supreme Court acknowledged that a petitioner’s “reasonable
14 confusion” about the timeliness of his federal petition would generally constitute good cause for
15 his failure to exhaust state remedies before filing his federal petition. Pace v. DiGuglielmo, 544
16 U.S. 408, 416-17 (2005). However, in Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008), the
17 Ninth Circuit ruled that petitioner did not show good cause by arguing that he was “under the
18 impression” that his counsel had raised all claims before the state court of appeal. Wooten, 540
19 F.3d at 1024. The Ninth Circuit explained that finding good cause in that argument “would
20 render stay-and-abey orders routine” and “would run afoul of Rhines and its instruction that
21 district courts should only stay mixed petitions in ‘limited circumstances.’” Wooten, 540 F.3d at
22 1024. In 2014, the Ninth Circuit clarified that “[t]he good cause element is the equitable
23 component of the Rhines test,” and that although “a bald assertion cannot amount to a showing of
24 good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to exhaust,
25 will.” Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014).

26 Second, the court may also stay a petition setting forth only exhausted claims, to permit
27 exhaustion of additional claims with the intention that they will be added by amendment
28 following exhaustion. King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) (citing Kelly, 315 F.3d at

1 1063). If the petition currently on file is fully exhausted, petitioner could seek a stay-and-
2 abeyance order to exhaust claims not raised in that federal petition under Kelly. However, the
3 Ninth Circuit has warned that “[a] petitioner seeking to use the Kelly procedure will be able to
4 amend his unexhausted claims back into his federal petition once he has exhausted them only if
5 those claims are determined to be timely . . . [a]nd demonstrating timeliness will often be
6 problematic under the now-applicable legal principles.” King, 564 F.3d at 1140-41. If a
7 petitioner’s newly-exhausted claims are untimely, he will be able to amend his petition to include
8 them only if they share a “common core of operative facts” with the claims in the original federal
9 petition.

10 If petitioner seeks to file a motion for stay under Rhines, he must file a motion for stay
11 and address all three of the Rhines elements set forth above. If petitioner seeks to stay this action
12 under Kelly, petitioner is warned that the Kelly approach is riskier for petitioners in that the
13 timeliness of the new claims will depend on whether they “relate back” to the original, timely
14 filed claims. King, 564 F.3d at 1142, citing Mayle v. Felix, 545 U.S. 644 (2005).

15 Here, respondent has filed an answer, and argues that both of petitioner’s claims are
16 unexhausted and are solely based on state law, and that petitioner’s second claim is also
17 procedurally defaulted. Petitioner’s traverse is due on or about October 15, 2017. Petitioner now
18 states he should have filed the instant petition in the California Supreme Court. Because it
19 appears he concedes the instant claims are unexhausted, he cannot use the Kelly procedure.

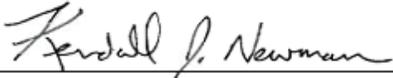
20 Thus, petitioner is granted thirty days in which to file his reply and, a motion for stay, if
21 he so chooses. By this order, the undersigned makes no ruling as to whether or not a motion for
22 stay would be granted.²

23 ² Petitioner should not unduly delay the exhaustion of any claims in state court. A one year
24 statute of limitations is applicable to all claims presented in a federal habeas corpus petition. See
25 28 U.S.C. § 2244(d)(1); see also Mardesich v. Cate, 668 F.3d 1164 (9th Cir. 2012) (holding that
26 the one year statute of limitations applied to each claim in a habeas petition on an individual
27 basis). Moreover, if petitioner exhausts any claim during the pendency of this action, petitioner
28 may seek leave to amend his petition at that time to include such newly-exhausted claims. Woods
v. Carey, 525 F.3d 886, 888 (9th Cir. 2008) (if a new petition is filed when a previous habeas
petition is still pending before the district court without a decision having been rendered, then the
new petition should be construed as a motion to amend the pending petition).

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Accordingly, IT IS HEREBY ORDERED that petitioner is granted thirty days in which to file his traverse and, if he chooses, a motion for stay.

Dated: October 17, 2017


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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