

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE ANTONIO DURAN,  
Petitioner,  
v.  
SCOTT FRAUENHEIM,  
Respondent.

No. 2:17-cv-2122 GEB AC P

## ORDER

Response

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has not, however, filed an in forma pauperis application or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). He will be provided the opportunity to either submit the appropriate application in support of a request to proceed in forma pauperis or submit the appropriate filing fee.

Petitioner has also moved for a stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005). ECF No. 2. A Rhines stay is available for (1) a petition containing only unexhausted claims, or (2) a petition that is “mixed” (contains both exhausted and unexhausted claims). See Rhines, supra; see also Mena v. Long, 813 F.3d 907, 910 (9th Cir. 2016). A Rhines stay preserves the federal filing date for unexhausted claims contained in the federal petition. In order to obtain a stay under Rhines, the petitioner must show that (1) good cause exists for his failure to have first exhausted the claims in state court, (2) the claim or claims at issue potentially have

1 merit, and (3) petitioner has not intentionally delayed pursuing the litigation. Rhines, at 544 U.S.  
2 at 277-78.

3 Alternatively, a petitioner may seek to stay an exhausted-claims-only petition pursuant to  
4 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir.  
5 2009) (citing three-step procedure of Kelly). Under the Kelly procedure, the court may stay a  
6 petition containing only exhausted claims while allowing the petitioner to proceed to state court  
7 to exhaust additional claims. Id. (citing Kelly, 315 F.3d at 1070-71). The procedure under Kelly  
8 is as follows: “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court  
9 stays and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the  
10 opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later  
11 amends his [federal] petition” to reincorporate the newly exhausted claims. Id. The Kelly stay-  
12 and-abeyance procedure does not require petitioner to demonstrate good cause or that the claims  
13 have merit. However, using the Kelly procedure means that any newly-exhausted claims later  
14 added to the federal petition by amendment must “relate back” to the claims in the stayed petition  
15 or otherwise satisfy applicable timeliness requirements. In other words, “the Kelly procedure,  
16 unlike the Rhines procedure, does nothing to protect a petitioner’s unexhausted claims from  
17 untimeliness in the interim.” Id. at 1141.

18 In both the motion for stay and petition, petitioner states that all of the claims in the  
19 petition currently before the court have been presented to the California Supreme Court.<sup>1</sup> ECF  
20 No. 1 at 14; ECF No. 2 at 2. Because it appears that the current petition is fully exhausted,  
21 petitioner cannot obtain a stay under Rhines and the motion will be denied. However, the denial  
22 will be without prejudice and petitioner must decide how he would like to proceed.

23 Petitioner’s first option is to file a motion for a stay under Kelly. Because the petition is  
24 already fully exhausted, petitioner need only request a stay to allow him to return to state court to  
25 exhaust his new claims. Once those claims have been exhausted, he will need to file a motion in  
26 this court asking to amend the petition to add in the newly exhausted claims. A stay under Kelly

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28 <sup>1</sup> Petitioner also indicates that he has already begun pursuing his unexhausted claims in state  
court. ECF No. 1 at 14; ECF No. 2 at 2-3.

1 does not provide any protection from untimeliness for the unexhausted claims while petitioner is  
2 in state court. The timeliness of newly-exhausted claims may be considered by the court in  
3 deciding whether to permit amendment.

4 Petitioner's second option is to file a motion to amend the petition that includes a copy of  
5 the proposed amended petition which contains all of the claims, both exhausted and unexhausted,  
6 that petitioner intends to bring before this court. At the same time, he must file a motion for a  
7 stay under Rhines. The motion for stay must (1) provide a good reason why petitioner did not  
8 exhaust his claims in state court before filing them in this court, (2) show that the unexhausted  
9 claim or claims potentially have merit, and (3) show that he has not intentionally delayed in  
10 bringing the unexhausted claims. Rhines, 544 U.S. at 277-78. If the motions to amend and to  
11 stay are granted, then the entire petition will be stayed while petitioner returns to state court to  
12 exhaust his unexhausted claims. Once the claims have been exhausted, petitioner will notify this  
13 court and the case will proceed on the amended petition and the originally unexhausted claims  
14 will have their initial filing date preserved. The court does not guarantee that petitioner's claims  
15 will be timely even if he is granted a stay under Rhines.

16 Finally, petitioner may proceed on the current, fully exhausted petition without a stay. In  
17 the event petitioner chooses to proceed on an exhausted-claims-only petition without a stay, he is  
18 cautioned that any future attempt to amend the petition to add newly-exhausted claims might face  
19 challenges based on timeliness, the limitations applicable to second or successive petitions, and/or  
20 other procedural hurdles, depending on the circumstances.

21 Accordingly, IT IS HEREBY ORDERED that:

22 1. Petitioner shall submit, within thirty days from the date of this order, an application in  
23 support of his request to proceed in forma pauperis or the appropriate filing fee; petitioner's  
24 failure to comply with this order will result in a recommendation that this action be dismissed.

25 2. The Clerk of the Court is directed to send petitioner a copy of the in forma pauperis  
26 form used by this district.

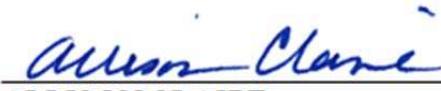
27 3. Petitioner's motion for stay (ECF No. 2) is denied without prejudice.

28 4. Within thirty days of service of this order, petitioner must do one of the following:

- 1 a. File a motion for a stay under Kelly;
- 2 b. File a motion to amend the petition to add in the unexhausted claims with a
- 3 copy of the proposed amended petition attached and file a motion for a stay under Rhines;
- 4 or
- 5 c. File a notice stating that he wants to proceed on the current petition without a
- 6 stay.
- 7 5. If petitioner does not take any action, the case will proceed on the original petition
- 8 without a stay.

9 IT IS SO ORDERED.

10 DATED: October 30, 2017

11   
12 ALLISON CLAIRE  
13 UNITED STATES MAGISTRATE JUDGE

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