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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL LEE MOREAU,
Petitioner,
v.
M.E. SPEARMAN,
Respondent.

No. 2:17-cv-2439 KJN P

ORDER

I. Introduction

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis. Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

On the first page of his petition, petitioner claims his petition is “for a stay on writ of certiorari, while issues not on appeal are revisited at superior court and state appeal.” (ECF No. 1 at 1.) Petitioner states that all grounds in his fourth claim were not raised because “trial counsel refused to listen to” plaintiff, and his appellate counsel “would not take these matters in.” (ECF No. 1 at 5.) It appears petitioner seeks a stay of this action pending the filing of his petition for writ of certiorari in the United States Supreme Court, as well as a stay to file an amended writ of

1 habeas corpus in this court while he exhausts new claims in the state courts. Petitioner
2 affirmatively states he had no petition or appeal pending in any court at the time he filed the
3 instant petition. (ECF No. 1 at 5.)

4 As discussed below, petitioner's motion for stay is denied without prejudice.

5 II. Background

6 Petitioner was convicted on May 16, 2016, and sentenced to twelve years in state prison.

7 On June 13, 2017, his conviction was affirmed by the California Court of Appeal, Third
8 Appellate District.

9 On August 16, 2017, his petition for review was denied by the California Supreme Court.

10 On November 15, 2017, the instant petition was placed in the hands of prison staff for
11 mailing. (ECF No. 1 at 7.)

12 III. Writ of Certiorari

13 Petitioner had ninety days from August 16, 2017, to file a petition for writ of certiorari
14 with the U.S. Supreme Court. See Sup. Ct. R. 13. Thus, the deadline for filing a petition for writ
15 of certiorari expired on November 14, 2017. Under the mailbox rule,¹ petitioner constructively
16 filed the instant petition on November 15, 2017, the day after the deadline to file the petition for
17 writ of certiorari expired. Because petitioner stated no petition was pending at the time he filed
18 the instant petition, it appears that unless petitioner filed his petition for writ of certiorari on or
19 before November 14, 2017, his deadline to do so has now expired. Thus, petitioner's request to
20 stay this action pending the filing of a petition for writ of certiorari after November 15, 2017, is
21 denied.

22 IV. Exhaustion of State Court Remedies

23 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
24 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived
25 explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).² A waiver of exhaustion, thus, may

26 ¹ See Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir. 2010) (under the mailbox rule, the
27 petition is deemed filed when handed to prison authorities for mailing).

28 ² A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C.

1 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the
2 highest state court with a full and fair opportunity to consider all claims before presenting them to
3 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
4 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

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

11 [i]f state courts are to be given the opportunity to correct alleged
12 violations of prisoners’ federal rights, they must surely be alerted to
13 the fact that the prisoners are asserting claims under the United
14 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.

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

21 Here, petitioner concedes that he has not yet exhausted some portion of his fourth claim
22 for relief. But he fails to specifically identify which ineffective assistance of counsel claims are
23 not yet exhausted in state court. In any event, petitioner concedes that his fourth claim includes
24 unexhausted claims; therefore, the petition is a “mixed petition,” containing both exhausted and
25 unexhausted claims.

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28 § 2254(b)(2).

1 V. Motion for Stay

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

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

13 “Good cause” under Rhines is not clearly defined. The Supreme Court has explained that
14 in order to promote the Anti-Terrorism and Effective Death Penalty Act’s (“AEDPA”) twin goals
15 of encouraging the finality of state judgments and reducing delays in federal habeas review, “stay
16 and abeyance should be available only in limited circumstances.” Rhines, 544 U.S. at 277. The
17 Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an
18 “extraordinary circumstances” standard. Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005).
19 Several district courts have concluded that the standard is more generous than the showing
20 needed for “cause” to excuse a procedural default. See, e.g., Rhines v. Weber, 408 F. Supp. 2d
21 844, 849 (D. S.D. 2005) (applying the Supreme Court’s mandate on remand). This view finds

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23 ³ A second procedure for staying mixed petitions, known as the “Kelly procedure,” outlined in
24 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), has been described by the Ninth Circuit Court of
25 Appeals to involve the following three-step process: “(1) petitioner amends his petition to delete
26 any unexhausted claims, (2) the court stays and holds in abeyance the amended, fully exhausted
27 petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted
28 claims, and (3) petitioner later amends his petition and re-attaches the newly-exhausted claims to
the original petition.” King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009). The Kelly procedure
is riskier than the Rhines procedure because it does not protect a petitioner’s unexhausted claims
from expiring during a stay and becoming time-barred under the one year statute of limitations.
See King, 564 F.3d at 1140-41.

1 support in Pace, where the Supreme Court acknowledged that a petitioner’s “reasonable
2 confusion” about the timeliness of his federal petition would generally constitute good cause for
3 his failure to exhaust state remedies before filing his federal petition. Pace v. DiGuglielmo, 544
4 U.S. 408, 416-17 (2005). However, in Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008), the
5 Ninth Circuit ruled that petitioner did not show good cause by arguing that he was “under the
6 impression” that his counsel had raised all claims before the state court of appeal. Wooten, 540
7 F.3d at 1024. The Ninth Circuit explained that finding good cause in that argument “would
8 render stay-and-abey orders routine” and “would run afoul of Rhines and its instruction that
9 district courts should only stay mixed petitions in ‘limited circumstances.’” Wooten, 540 F.3d at
10 1024. In 2014, the Ninth Circuit clarified that “[t]he good cause element is the equitable
11 component of the Rhines test,” and that although “a bald assertion cannot amount to a showing of
12 good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to exhaust,
13 will.” Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014).

14 The conclusory statements included in the instant petition are insufficient to demonstrate
15 petitioner is entitled to a stay under Rhines. In order to obtain a stay of this action, petitioner
16 must file a motion for stay that identifies the type of stay he seeks, and support the motion by
17 addressing all three of the Rhines elements set forth above. Because the instant petition is a
18 mixed petition, it must be dismissed unless petitioner is granted a stay under Rhines v. Weber,
19 544 U.S. 269 (2005).

20 VI. Conclusion

21 Petitioner’s request for stay is factually unsupported as required under Rhines. Thus,
22 petitioner’s request for stay is denied, and he is granted thirty days in which to file a motion for
23 stay under Rhines, if he so chooses. By this order, the undersigned makes no ruling as to whether
24 or not a motion for stay would be granted.⁴

25 ⁴ Petitioner should not delay the exhaustion of any claims in state court. A one year statute of
26 limitations is applicable to all claims presented in a federal habeas corpus petition. See 28 U.S.C.
27 § 2244(d)(1); see also Mardesich v. Cate, 668 F.3d 1164 (9th Cir. 2012) (holding that the one
28 year statute of limitations applied to each claim in a habeas petition on an individual basis).
Moreover, “[w]hen a postconviction petition is untimely under state law, that is the end of the
matter for purposes of § 2244(d)(2).” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

1 If petitioner fails to file a motion for stay, he will be required to file an amended petition
2 including only unexhausted claims.

3 Accordingly, IT IS HEREBY ORDERED that:

- 4 1. Petitioner's request for a stay (ECF No. 1) is denied without prejudice; and
5 2. Petitioner is granted thirty days in which to file a motion for stay.

6 Dated: December 14, 2017

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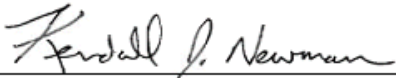
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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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Finally, if petitioner exhausts any claim during the pendency of this action, petitioner 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).