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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM HOLT BAYMILLER,
Petitioner,
v.
PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

No. 2: 17-cv-2458 KJN P

ORDER

Petitioner, a state prisoner proceeding without counsel, has 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.

Petitioner challenges a 2012 murder conviction from Tehama County. The petition raises two claims which appear to have been presented to the California Supreme Court on direct appeal. Thus, these two claims appear to be exhausted.

Petitioner also states that after the instant petition is filed, his jailhouse lawyer will raise a new claim, i.e., that petitioner lacked the mental capacity to form intent to commit murder. It does not appear that this claim has been presented to any court. If petitioner intends to exhaust this new claim in state court, it is unclear whether he is seeking to stay the instant petition pending exhaustion of this new claim.

1 Federal district courts should stay mixed petitions only in limited circumstances. Rhines
2 v. Kelly, 544 U.S. 269, 277 (2005). A district court may stay a mixed petition if: (1) the
3 petitioner demonstrates good cause for failing to have first exhausted all claims in state court;
4 (2) the claims potentially have merit; and (3) petitioner has not been dilatory in pursuing the
5 litigation. Id. at 277-78.

6 In the alternative, a court may stay a mixed petition if: (1) the petitioner amends his
7 petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended,
8 fully exhausted petition, allowing the petitioner to proceed to exhaust the deleted claims in state
9 court; and (3) petitioner later amends his petition and reattaches the newly exhausted claims to the
10 original petition. Kelly v. Small, 315 F.3d 1063, 1070-71 (9th Cir. 2003). The Kelly procedure is
11 riskier than the Rhines procedure since it does not protect the petitioner's unexhausted claims
12 from expiring during the stay. King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009).

13 Despite the risk of the unexhausted claims becoming time-barred in the course of the
14 Kelly procedure, a petitioner may elect to use that alternative since it does not require him to
15 demonstrate good cause as does the Rhines procedure. King, 564 F.3d at 1140.

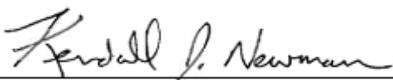
16 Petitioner is ordered to inform the court within thirty days whether he wishes to proceed
17 with his exhausted claims at this time or, instead, whether he wishes to stay this action pending
18 exhaustion of an unexhausted claim. If petitioner seeks a stay, he shall file a motion addressing
19 whether the stay is sought pursuant to the procedures outlined in Rhines or Kelly. If petitioner
20 intends to proceed with his exhausted claims at this time, the undersigned will direct the Office of
21 the Attorney General to respond to his exhausted claims.

22 In accordance with the above, IT IS HEREBY ORDERED that:

- 23 1. Petitioner's motion to proceed in forma pauperis is granted;
24 2. Within thirty days of the date of this order, petitioner shall inform the court whether he
25 wishes to proceed with his exhausted claims, or whether he wishes to stay this action pending
26 exhaustion of unexhausted claims.

27 Dated: February 7, 2018

28 Bay2458.ord

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE