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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAKE CLARK,

 Petitioner,

 v.

RAYTHEL FISHER, JR., Warden,

 Respondent.

No. 2:17-cv-02574-TLN-GGH
ORDER

PROCEDURAL HISTORY

Petitioner, appearing pro se, filed his petition for writ on December 8, 2017. ECF No. 1. On December 27, 2017, the court granted petitioner in forma pauperis status. ECF No. 8. Respondent moved to dismiss the action in February 23, 2018 on the ground that it contained unexhausted claims and therefore could not proceed given the requirement for exhaustion found in 28 U.S.C. section 2254 (b)(1)(A). ECF No. 17. After receiving a 30 day extension of time to do so, ECF No. 23, respondent opposed the motion for stay and abeyance on July 10, 2018. There is no question that 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). “Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state

1 court.” Harrington v. Richter, 562 U.S. 86, 103 (2011); see also O’Sullivan v. Boerckel, 526 U.S.
2 838, 845 (1999) (“the exhaustion doctrine is designed to give the state courts a full and fair
3 opportunity to resolve federal constitutional claims before those claims are presented to the
4 federal courts”). A petitioner satisfies the exhaustion requirement by providing the highest state
5 court with a full and fair opportunity to consider all claims before presenting them to the federal
6 court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th
7 Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). For a California prisoner to exhaust, he must
8 present his claims to the California Supreme Court on appeal in a petition for review or post-
9 conviction in a petition for a writ of habeas corpus in which he adequately describes the federal
10 Constitutional issue that he asserts was denied. See Gatlin v. Madding, 189 F.3d 882, 888 (9th
11 Cir. 1999).

12 Petitioner shows in his filings that he did file an appeal with the California Supreme Court
13 but he does not describe the substance of the appeal. So it is not possible for the court to discern
14 whether the claims now asserted in his federal habeas were presented to that court or not. Insofar
15 as petitioner recognizes his need to exhaust, he appears to concede that he has not raised those
16 claims at the state level. And, even assuming he did do so, he has not provided the factual
17 underpinnings for the federal habeas claim.

18 In response to the motion to dismiss, petitioner sought an extension of time to file a
19 motion for stay and abeyance pursuant to Rhines v. Weber, 544 U.S. 269 (2005), ECF No. 19,
20 which motion he filed on March 21, 2018. ECF No. 21. Respondent now opposes the
21 petitioner’s motion for stay and abeyance on the ground that he has not shown sufficient cause for
22 his failure to exhaust and he has not shown a sufficient likelihood of success on the merits of his
23 petition. ECF No. 25.

24 *DISCUSSION*

25 Under Rhines, a district court may stay a petition to allow a petitioner to present
26 unexhausted claims to the highest state court. Id. at 277. Assuming the petition has been timely
27 filed, such a stay “eliminates entirely any limitations issue with regard to the originally
28 unexhausted claims, as the claims remain pending in federal court[.]” King v. Ryan, 564 F.3d

1 1133, 1135 (9th Cir. 2009). However, in order to qualify for a stay under Rhines, a petitioner
2 must: (1) show good cause for his failure to exhaust all his claims before filing this action; (2)
3 explain and demonstrate how his unexhausted claim is potentially meritorious; (3) describe the
4 status of any pending state court proceedings on his unexhausted claim; and (4) explain how he
5 has diligently pursued his unexhausted claim. Rhines at 277-278.

6 What constitutes good cause has not been precisely defined except to indicate at the outer
7 end petitioner must not have engaged in purposefully dilatory tactics, id., and that “extraordinary
8 circumstances” need not be found. Jackson v. Roe, 425 F.3d 654, 661-662 (9th Cir. 2005); see
9 also Rhines at 279 (Stevens, J., concurring)(the “good cause” requirement should not be read “to
10 impose the sort of strict and inflexible requirement that would trap the unwary pro se
11 prisoner”)(internal citation omitted); Id. (Souter, J. concurring) (pro se habeas petitioners do not
12 come well trained to address tricky exhaustion determinations). “But as the Jackson court
13 recognized, we must interpret whether a petitioner has “good cause” for a failure to exhaust in
14 light of the Supreme Court’s instruction in Rhines that the district court should only enter such a
15 stay in “limited circumstances.” We must also be mindful that AEDPA aims to encourage the
16 finality of sentences and to encourage petitioners to exhaust their claims in state court before
17 filing in federal court.” Wooten v. Kirkland, 540 F.3d 1019, 1023-1024 (9th Cir. 2008), *quoting*
18 Jackson, 425 .3d at 661, (internal quotations omitted).

19 The Ninth Circuit stated that “a reasonable excuse, supported by evidence to
20 justify a petitioner’s failure to exhaust,” will demonstrate “good cause” under Rhines. Blake v.
21 Baker, 745 F.3d 977, 982 (9th Cir. 2014). Unfortunately, petitioner at this point has failed to
22 meet both of the overarching requirements discussed here.

23 A. *Showing of Good Cause*

24 Petitioner includes the legal standards for his petition and his request for stay and
25 abeyance, but states no facts to tie his claims to those standards. He enters the cryptic statement
26 “see attached memorandum” on page 5 of his petition which purports to state ground one for his
27 petition, but there is no memorandum attached. In fact, the only substantive attachment is the
28 Third District Court of Appeal decision which is found at Exhibit A to the petition. ECF No. 1 at

1 5. As to why he did not exhaust state remedies as to ground one of his petition he states only
2 “N/A Did all processes to knowledge” and “petitioner contends jury instructions relate to the
3 claims raised.” If this statement means to convey that he did not know exhaustion was required,
4 his ultimate desire for stay and abeyance will fail, as will his petition itself, as lack of knowledge
5 of the requirements underlying the writ is not “good cause.” The Ninth Circuit has made clear
6 that good cause cannot be based on mere ignorance of the law because such a finding “would
7 render stay-and-abeyance orders routine” and thus “would run afoul of Rhines and its instruction
8 that district courts should only stay mixed petitions in “limited circumstances.” Wooten v.
9 Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008); see also Hughes v. Idaho State Board of
10 Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (ignorance of the law does not constitute an excuse
11 from failing to exercise due diligence). Thus, unless petitioner can state specific facts regarding
12 his failure to exhaust beyond his claim he did all within his knowledge to meet the prefiling
13 standard for habeas, his motion for stay and abeyance must fail on this ground alone.

14 *B. Explanation and Demonstration of Potential Merits of Unexhausted Claims*

15 Petitioner implies that the core of his petition is a failure to properly instruct the jury
16 either because his attorney provided insufficient representation in failing to seek instructions on
17 various core issues, or because the court failed to *sua sponte* instruction while under a duty to do
18 so. Again, however, petitioner states a premise for the petition, but he does not state any facts
19 regarding what evidence was presented at the trial that would support the instructions he lists as
20 that, having not been given to the jury, resulted in a denial of a fair trial as a matter of federal
21 constitutional law. He fails this prong of the test for stay and abeyance, while at the same time
22 failing to provide a creditable habeas petition in the first instance.

23 *C. Status of Any Pending State Court Proceedings on Unexhausted Claims*

24 Petitioner does not claim that he has any pending state court proceedings at this stage nor
25 does he assure the court that he is prepared to bring them. This is yet another flaw in petitioner’s
26 pleadings at this stage of the litigation process.

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1 addressed in this Order within 30 days of the Order’s service.

2 2. Petitioner’s request for a stay and abeyance is DENIED without prejudice, subject
3 to the completion of the filing of an Amended Petition together with a new Rhines motion which
4 addresses the preconditions for the granting of such a motion.

5 Dated: September 3, 2018

6 /s/ Gregory G. Hollows
7 UNITED STATES MAGISTRATE JUDGE

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