



1 stay as well as what petitioner must show for the court to grant a motion for stay and abeyance.  
2 Should petitioner seek a stay he should ensure that he meets all of the requirements for the court  
3 to grant the type of stay requested.

#### 4 TYPES OF STAY

5 Federal law recognizes two different procedures that a prisoner may use to stay a federal  
6 habeas action to exhaust unexhausted claims. See Rhines, 544 U.S. 269 (2005) (staying timely  
7 mixed petition); Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) (allowing prisoner to dismiss  
8 unexhausted claims and stay the action as to exhausted claims subject to potential later  
9 amendment of petition), overruled on other grounds, Robbins v. Carey, 481 F.3d 1143 (9th Cir.  
10 2007).

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

18 The second stay procedure is referred to as a “Kelly stay.” Under Kelly, the court may  
19 also stay a petition setting forth only exhausted claims, to permit exhaustion of additional claims  
20 with the intention that they will be added by amendment following exhaustion. King v. Ryan,  
21 564 F.3d 1133 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1063). However, the Ninth Circuit has  
22 warned that “[a] petitioner seeking to use the Kelly procedure will be able to amend his  
23 unexhausted claims back into his federal petition once he has exhausted them only if those claims  
24 are determined to be timely...[a]nd demonstrating timeliness will often be problematic under the  
25 now-applicable legal principles.” King, 564 F.3d at 1140-41. If a petitioner's newly exhausted  
26 claims are untimely, he will be able to amend his petition to include them only if they share a  
27 “common core of operative facts” with the claims in the original federal petition. Id. at 1141.

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**CONCLUSION**

Good cause appearing, IT IS HEREBY ORDERED that:

1. Petitioner's motion for an extension of time (ECF No. 38) is granted; and
2. Petitioner is granted sixty days from the date of this order file a motion for stay and abeyance of the present action.

DATED: September 3, 2021

  
DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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