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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIEGO GONZALEZ,

No. C-12-4557 EMC (pr)

Petitioner,

v.

**ORDER TO STAY PROCEEDINGS AND
ADMINISTRATIVELY CLOSE THE
CASE**

WILLIAM KNIPP, Warden,

Respondent.

Petitioner has filed a motion to hold his federal habeas petition in abeyance so that he can return to the California state courts to present one or more unexhausted claims.

There are two kinds of stay and abeyance proceedings available in a habeas action: the *Rhines* stay and the *King/Kelly* stay. A stay under *Rhines v. Weber*, 544 U.S. 269 (2005), “is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court,” the claims are not meritless, and there are no intentionally dilatory litigation tactics by the petitioner. *Id.* at 277-78. Petitioner has not satisfied the criteria for a *Rhines* stay because he has not explained why he did not exhaust the claims before filing his federal petition and he has not shown that the unidentified claims he wants to present to the state courts are not meritless.

The *King/Kelly* stay provides an alternative method to deal with a petitioner who has some unexhausted claims he wants to present in his federal habeas action. Under the procedure outlined in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007), “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted petition, allowing the


1 petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the
2 petitioner later amends his petition and re-attaches the newly-exhausted claims to the original
3 petition.” *King v. Ryan*, 564 F.3d 1133, 1134 (9th Cir. 2009) (citing *Kelly*, 315 F.3d at 1070-71). A
4 petitioner seeking to avail himself of the *King/Kelly* three-step procedure is not required to show
5 good cause as under *Rhines*. *See id.* at 1141. Here, Petitioner satisfies the only currently applicable
6 requirement for a *King/Kelly* stay, *i.e.*, that his petition has no unexhausted claims. The claims in
7 the petition appear to have been exhausted, as both were discussed in the California Court of
8 Appeal’s opinion affirming Petitioner’s conviction. The *King/Kelly* stay does not appear to require
9 this Court to decide whether the claims relate back at the time it considers whether to grant a stay.
10 Whether the claims relate back to the petition can be decided when he returns after exhausting state
11 court remedies and moves to amend his petition to add those newly-exhausted claims. The Court
12 will grant a *King/Kelly* stay so that Petitioner may exhaust state court remedies for all the claims he
13 wishes to present to this Court.

14 For the foregoing reasons, Petitioner’s motion to hold his petition in abeyance is
15 **GRANTED**. (Docket # 7.) This action is now **STAYED** and the Clerk shall
16 **ADMINISTRATIVELY CLOSE** the action. Nothing further will take place in this action until
17 Petitioner exhausts state court remedies for any unexhausted claims and then moves to reopen this
18 action, lift the stay and amend his petition to add any new claims. Petitioner must act diligently to
19 get his state court petition filed and promptly return to this Court – *i.e.*, within thirty days after his
20 state court proceedings have concluded. *See Kelly*, 315 F.3d at 1070.

21 In light of the stay, the briefing schedule set in the Order To Show Cause is vacated and
22 Respondent’s motion for an extension of the deadline to respond to the petition is dismissed as moot.
23 (Docket # 8.)

24 IT IS SO ORDERED.

25 Dated: January 3, 2013

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27 
28 EDWARD M. CHEN
United States District Judge