

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 DUNG TRAN,

5 Petitioner,

6 v.

7 TIM VIRGA, Warden,

8 Respondent.

No. C 11-0877 CW

ORDER GRANTING
MOTION TO STAY
PETITION;
DIRECTING CLERK OF
THE COURT TO
ADMINISTRATIVELY
CLOSE CASE UNTIL
STAY IS LIFTED

9 _____/ (Docket no. 12)
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11 Petitioner, a state prisoner proceeding pro se, filed this
12 petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254,
13 raising claims of ineffective assistance of counsel and
14 instructional error. Following an initial review of the petition,
15 the Court found Petitioner's claims cognizable and ordered
16 Respondent to show cause why the petition should not be granted.
17 Respondent filed an answer addressing the merits of the claims.
18 Petitioner, in lieu of filing a traverse, has filed a motion to
19 stay the proceedings so that he may exhaust new claims of
20 instructional error in state court. Respondent has not opposed
21 the motion.

22 A district court may stay a mixed habeas petition, i.e., a
23 petition containing both exhausted and unexhausted claims, to
24 allow the petitioner to exhaust state court remedies as to those
25 claims that have not yet been presented to the state's highest
26 court. See Rhines v. Weber, 544 U.S. 269, 277-78 (2005). In
27 Rhines, the Supreme Court discussed the stay-and-abeyance
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1 procedure, explaining that a stay and abeyance "is only
2 appropriate when the district court determines there was good
3 cause for the petitioner's failure to exhaust his claims first in
4 state court," the claims are not meritless, and there are no
5 intentionally dilatory litigation tactics by the petitioner. Id.

6 The instant case is distinguishable from Rhines, however,
7 because Petitioner did not file a mixed petition; rather, he filed
8 a fully exhausted petition and now asks for a stay while he
9 returns to state court to exhaust unexhausted claims. In King v.
10 Ryan, 564 F.3d 1133 (9th Cir. 2009), the Ninth Circuit clarified
11 that the procedure for granting a stay under such circumstances is
12 different from the procedure employed where a petitioner seeks to
13 stay a mixed petition. Specifically, where a petitioner seeks a
14 stay of a fully exhausted petition while he returns to state court
15 to exhaust unexhausted claims, no showing of good cause is
16 required to stay the petition. Id. at 1140. Thereafter, however,
17 the newly exhausted claims can be added to the original petition
18 by amendment only if the claims are timely under the one-year
19 statute of limitations set forth at 28 U.S.C. § 2244(d)(1). Id.
20 at 1140-41. If the newly exhausted claims are not timely filed in
21 accordance with said statute, they can be added to the original
22 petition by amendment only if they "relate back" to the claims in
23 the original petition that were fully exhausted at the time of
24 filing. Id. at 1142-43 (citing Mayle v. Felix, 545 U.S. 644, 659
25 (2005)); Fed. R. Civ. P. 15(c).

26 Here, as noted, Petitioner moves to stay his fully exhausted
27 petition so that he may return to state court to exhaust new
28 claims of instructional error, which he will move to add to the

1 present petition. Under such circumstances, the Court may grant a
2 stay without a showing of good cause. See King, 564 F.3d at 1140.

3 Accordingly, Petitioner's motion to stay the petition is
4 GRANTED and these proceedings are hereby STAYED pending the
5 exhaustion of his new claims in state court.¹


6 Once the California Supreme Court has issued a decision on
7 Petitioner's new claims, and if he does not obtain the relief he
8 seeks in state court, Petitioner shall, within thirty days of the
9 California Supreme Court's decision, file in this court a "Motion
10 to Lift Stay and Reopen Action," along with an amended petition
11 that includes all of the claims that he wishes to present in his
12 federal habeas corpus petition. Failure to comply with these
13 deadlines may result in the dismissal of this action.

14 The Clerk of the Court shall ADMINISTRATIVELY CLOSE the file
15 pending the stay of this action.

16 This Order terminates Docket no. 12.

17 IT IS SO ORDERED.

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19 Dated: 8/10/2012

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CLAUDIA WILKEN
United States District Judge

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¹ The Court does not determine at this time whether
Petitioner's new claims will be found timely under the one-year
statute of limitations set forth at 28 U.S.C. § 2244(d)(1) or, if
they are not, whether they will be found to "relate back" to the
original petition. Instead, the most pragmatic approach is to
wait to address these issues until Petitioner exhausts his state
remedies and moves to amend his petition with the newly exhausted
claims.