

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

SEBASTIAN SHEPHERD,)	
)	
Petitioner,)	
vs.)	NO. CIV-17-0427-HE
)	
HECTOR RIOS, Warden,)	
)	
Defendant.)	

ORDER

Petitioner is a state prisoner seeking habeas relief under 28 U.S.C. § 2254. The matter was referred to Magistrate Judge Gary Purcell for initial proceedings. Judge Purcell ordered a response to the petition. Shortly after entry of that order, petitioner sent a letter to the court indicating that he wished to suspend his habeas action in order to exhaust state remedies on new claims for ineffective assistance of appellate counsel. Judge Purcell construed the letter as a request to dismiss the habeas case, and did so. Petitioner then sent another letter, requesting that his case be stayed rather than dismissed while he exhausts his appellate counsel claims. The magistrate judge reopened the case but has submitted a Report and Recommendation recommending that the request for stay be denied.

Courts have the discretion to stay habeas proceedings when a petitioner brings a “mixed petition,” which is a petition that includes exhausted and unexhausted claims. Rhines v. Weber, 544 U.S. 269, 276-77 (2005). In order to justify a stay in such circumstances, a petitioner must show (1) “good cause for the petitioner’s failure to exhaust his claims first in state court,” (2) that his “unexhausted claims are [not] plainly meritless,”

and (3) he has not “engage[d] in abusive litigation tactics or intentional delay.” *Id.* at 277-78. Here, the petition does not qualify as a mixed petition because it does not include or identify the claims purportedly sought to be exhausted. Petitioner provides more explanation of the basis for those claims in his objection to the Report, but has not sought to amend his petition to add these claims. Raised as they are for the first time in an objection to Judge Purcell’s report and recommendation, the court declines to consider these new claims here, or assume their inclusion in petitioner’s current habeas action. *See United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) (“issues raised for the first time in objections to the magistrate judge’s report are deemed waived”). The only claims properly before this court are petitioner’s exhausted claims, therefore petitioner fails to satisfy the requirements for a stay of the proceedings.

The Report and Recommendation [Doc. # 15] is therefore **ADOPTED** and petitioner’s motion for stay is **DENIED**. This case remains pending before Judge Purcell for further initial proceedings.

IT IS SO ORDERED.

Dated this 6th day of July, 2017.



JOE HEATON
CHIEF U.S. DISTRICT JUDGE