

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID B. DAVIS,

Petitioner,

v.

MARTIN FRINK,¹

Respondent.

No. 2:16-cv-1159-GEB-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel in an action brought under 28 U.S.C. § 2254. Respondent moves to dismiss the case as partially unexhausted. ECF No. 15. For the reasons that follow, it is recommended that the motion be granted in part, that the petition be deemed amended to delete the unexhausted claim, and that petitioner be allowed an opportunity to inform the court whether he wishes to proceed immediately or will seek to exhaust the deleted claim.

I. Background

Petitioner was convicted of various charges related to an incident of domestic violence in the Shasta County Superior Court in 2014. ECF No. 18, Resp't's Notice of Lodging Document in Paper, Lodged Document (hereinafter "Lodg. Doc.") No. 1. The court sentenced him to a

¹ Petitioner named Tallahatchie County Correctional Facility as the respondent in this action. The court grants respondent's request to substitute Martin Frink, Warden of that facility (where petitioner is housed), as the proper respondent in this action. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

1 determinate sentence of 21 years in prison. *Id.* Petitioner sought review of the conviction in the
2 California Court of Appeal. Lodg. Doc. No. 2. The court rejected his appeal on January 28,
3 2016. *Id.* The California Supreme Court summarily denied petitioner's petition for review on
4 April 13, 2016. Lodg. Docs. Nos. 3, 4.

5 Petitioner has filed a single collateral attack on his conviction: a petition for writ of habeas
6 corpus filed in the Shasta County Superior Court on April 6, 2016. Lodg. Doc. No. 5. The court
7 denied the petition on April 26, 2016. Lodg. Doc. No. 6.

8 **II. The Motion to Dismiss**

9 Respondent argues that the petition should be dismissed because one of the claims raised
10 in the instant case has not been exhausted. ECF No. 15. Petitioner responds that he tried to
11 exhaust his claims by filing the same paperwork in the superior court, but that he is "not too
12 bright on what court is what." ECF No. 17.

13 **A. The Exhaustion Requirement**

14 A district court may not grant a petition for a writ of habeas corpus unless the petitioner
15 has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). A state will not be deemed
16 to have waived the exhaustion requirement unless the state, through counsel, expressly waives the
17 requirement. 28 U.S.C. § 2254(b)(3).

18 Exhaustion of state remedies requires that petitioners fairly present federal claims to the
19 highest state court, either on direct appeal or through state collateral proceedings, in order to give
20 the highest state court "the opportunity to pass upon and correct alleged violations of its
21 prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (some internal quotations
22 omitted). "[A] state prisoner has not 'fairly presented' (and thus exhausted) his federal claims in
23 state court unless he specifically indicated to that court that those claims were based on federal
24 law." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d 904 (9th Cir.
25 2000). "[T]he petitioner must make the federal basis of the claim explicit either by citing federal
26 law or the decisions of federal courts, even if the federal basis is self-evident" *Id.* (citations
27 omitted); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) ("[A] claim for relief in
28 habeas corpus must include reference to a specific federal constitutional guarantee, as well as a

1 statement of the facts that entitle the petitioner to relief.”); *Duncan*, 513 U.S. at 365-66 (to
2 exhaust a claim, a state court “must surely be alerted to the fact that the prisoners are asserting
3 claims under the United States Constitution.”).

4 In addition to identifying the federal basis of his claims in the state court, the petitioner
5 must also fairly present the factual basis of the claim in order to exhaust it. *Baldwin v. Reese*, 541
6 U.S. 27, 29 (2004); *Robinson v. Schriro*, 595 F.3d 1086, 1101 (9th Cir. 2010). “[T]he petitioner
7 must . . . provide the state court with the operative facts, that is, ‘all of the facts necessary to give
8 application to the constitutional principle upon which [the petitioner] relies.’” *Davis v. Silva*, 511
9 F.3d 1005, 1009 (9th Cir. 2008) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.
10 1958)).

11 Where a federal habeas petitioner has failed to exhaust a claim in the state courts
12 according to these principles, she may ask the federal court to stay its consideration of her petition
13 while she returns to state court to complete exhaustion. Two procedures may be used in staying a
14 petition – one provided for by *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002) and the other by
15 *Rhines v. Weber*, 544 U.S. 269 (2005). *King v. Ryan*, 564 F.3d 1133, 1138-41 (9th Cir. 2009).
16 Under the *Kelly* procedure, the district court may stay a petition containing only exhausted claims
17 and hold it in abeyance pending exhaustion of additional claims which may then be added to the
18 petition through amendment. *Kelly*, 315 F.3d at 1070-71; *King*, 564 F.3d at 1135. If the federal
19 petition contains both exhausted and unexhausted claims (a so-called “mixed” petition), a
20 petitioner seeking a stay under *Kelly* must first dismiss the unexhausted claims from the petition
21 and seek to add them back in through amendment after exhausting them in state court. *King*, 564
22 F.3d at 1138-39. The previously unexhausted claims, once exhausted, must be added back into
23 the federal petition within the statute of limitations provided for by 28 U.S.C. § 2244(d)(1),
24 however. *King*, 564 F.3d at 1140-41. Under that statute, a one-year limitation period for seeking
25 federal habeas relief begins to run from the latest of the date the judgment became final on direct
26 review, the date on which a state-created impediment to filing is removed, the date the United
27 States Supreme Court makes a new rule retroactively applicable to cases on collateral review or
28 the date on which the factual predicate of a claim could have been discovered through the

1 exercise of due diligence. 28 U.S.C. § 2241(d)(1). A federal habeas petition does not toll the
2 limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181-82
3 (2001).

4 Under *Rhines*, a district court may stay a mixed petition in its entirety, without requiring
5 dismissal of the unexhausted claims, while the petitioner attempts to exhaust them in state court.
6 *King*, 564 F.3d at 1139-40. Unlike the *Kelly* procedure, however, *Rhines* requires that the
7 petitioner show good cause for failing to exhaust the claims in state court prior to filing the
8 federal petition. *Rhines*, 544 U.S. at 277-78; *King*, 564 F.3d at 1139. In addition, a stay pursuant
9 to *Rhines* is inappropriate where the unexhausted claims are “plainly meritless” or where the
10 petitioner has engaged in “abusive litigation tactics or intentional delay.” *Id.*

11 **B. Analysis**

12 This federal petition contains four claims, one of which was not presented to the
13 California Supreme Court in petitioner’s sole filing there – that is, petitioner’s claim that his trial
14 counsel rendered constitutionally deficient assistance. Compare ECF No. 1-1 with Lodg. Doc.
15 No. 3. Accordingly, the petition is “mixed.” Petitioner has not expressly asked the court to stay
16 proceedings while he tries to exhaust the ineffective assistance claim, much less shown “good
17 cause” under *Rhines*. *Soto v. Lewis*, No. SA CV 13-1711-DPP (DFM), 2016 U.S. Dist. LEXIS
18 140838, at *14 (C.D. Cal. June 8, 2016) (noting that ignorance of the law is not good cause under
19 *Rhines*); see *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008) (noting that the good cause
20 standard must be interpreted to apply in limited circumstances according to the U.S. Supreme
21 Court’s direction in *Rhines*). Indeed, it is not clear from petitioner’s response to the motion to
22 dismiss whether he would like the court to stay the petition even under *Kelly* (which, as discussed
23 above, does not require a showing of good cause). Petitioner states that he wants to go forward
24 with this case and have the ineffective assistance claim “deleted,” but he also indicates some
25 dissatisfaction with that prospect. ECF No. 17 at 2 (stating that he has done “a lot more home
26 work on . . . ineffective counsel”).

27 Because the petition contains an unexhausted claim and petitioner has not provided good
28 cause for staying the case, petitioner has two options. The court can deem the petition amended

1 to delete the unexhausted claim, and then petitioner can either (1) inform the court that he wishes
2 to proceed with the petition as amended or (2) petitioner can ask the court to stay the case while
3 he files a petition in the California Supreme Court to exhaust the ineffective assistance claim and
4 then seek to amend the petition again to add the claim back. If petitioner picks option (1), he
5 should be aware that he may not thereafter be able to obtain federal review of his ineffective
6 assistance claim.

7 **III. Conclusion and Recommendation**

8 In accordance with the above analysis, it is hereby RECOMMENDED that:

- 9 1. Respondent's July 29, 2016 motion to dismiss (ECF No. 15) be granted in part such
10 that petitioner's ground four for relief (alleging ineffective assistance of counsel) be
11 dismissed and the petition be deemed amended to delete that claim; and
12 2. Petitioner be provided with 21 days from the date of any order adopting these findings
13 and recommendations to either (1) inform the court that he wishes to proceed on the
14 remaining claims or (2) file a motion with the court seeking to stay the case while he
15 exhausts the ineffective assistance claim in the California Supreme Court.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
21 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
22 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: February 7, 2017.

24 
25 EDMUND F. BRENNAN
26 UNITED STATES MAGISTRATE JUDGE
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