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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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WESTLEY VANCE HASKINS,

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CV 05-2352-PHX MHM (JM)

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Petitioner,

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ORDER

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vs.

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DORA SCHRIRO, Director, Arizona
Department of Corrections,

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Respondent.

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Currently before the Court are Petitioner’s Motion to Stay (Dkt. #53), Petitioner’s Motion to Amend Writ of Habeas Corpus (Dkt. #61), and Magistrate Judge Jacqueline Marshall’s accompanying Report and Recommendation (Dkt. #67).

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I. STANDARD OF REVIEW

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A district court must review the legal analysis in a Magistrate Judge’s Report and Recommendation *de novo*. See 28 U.S.C. § 636(b)(1)(C). In addition, a district court must review the factual analysis in the Report and Recommendation *de novo* for those facts to which objections are filed. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); see also 28 U.S.C. § 636(b)(1)(C) (“A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”). “Failure to object to a magistrate judge’s recommendation waives all objections to the judge’s findings of fact.” Jones v. Wood, 207 F.3d 557, 562 n. 2 (9th Cir. 2000).

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1 **II. PROCEDURAL HISTORY**

2 Petitioner Westley Haskins filed a Petition for Habeas Corpus pursuant to 28 U.S.C.
3 § 2254 on August 4, 2005. (Dkt. #1). The matter was referred to Magistrate Judge
4 Jacqueline Marshall for Report and Recommendation on June 21, 2006. (Dkt. #3). On May
5 5, 2008, following Respondent's Answer (Dkt. #18) and Petitioner's Motion to Conduct
6 Limited Discovery (Dkt. #26), Magistrate Judge Marshall filed her Report and
7 Recommendation that the Court deny the Petition for Writ of Habeas Corpus (Dkt. #35).

8 Petitioner then filed Objections to the Report and Recommendation, raising new
9 allegations of a Brady violation for failure to disclose felony convictions of state witnesses
10 and factual innocence with respect to his state conviction on one count of child abuse. (Dkt.
11 #37). In addition, Petitioner filed a Motion for a Procedural Order to authorize Petitioner to
12 use his personal typewriter to prepare documents with respect to this litigation due to his
13 diagnosis of osteoarthritis and degenerative joint disease (Dkt. #36). Petitioner also filed
14 a Motion to Stay Habeas Corpus Proceedings Pending Appeal (Dkt. #41).

15 On September 16, 2008, the Court adopted Magistrate Judge Marshall's Report and
16 Recommendation in part, denying both Petitioner's Motion to Conduct Limited Discovery
17 and Petitioner's due process claim with respect to the Arizona Court of Appeal's refusal to
18 remand, and granting Petitioner's unopposed Motion for a Procedural Order. (Dkt. #44).
19 The Court withheld ruling on the remainder of Judge Marshall's Report and
20 Recommendation and directed Respondents to address Petitioner's newly-raised allegations,
21 including whether those allegations are sufficient to warrant granting Petitioner's Motion to
22 Stay. Id. The Court requested a supplemental Report and Recommendation from Judge
23 Marshall on the merits of Petitioner's Motion to Stay. Id.

24 On September 19, 2008, Respondents requested that the Court stay the Order granting
25 Petitioner's Motion for Procedural Order to use his personal typewriter pending an Objection
26 by the Arizona Department of Corrections. (Dkt. #45). The Court granted that Motion on
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1 September 26, 2008. (Dkt. #47). The Department of Corrections filed their Objection on
2 October 27, 2008¹. (Dkt. #48)

3 Respondents filed their response to Petitioner's newly-raised allegations of factual
4 innocence and a Brady violation on October 31, 2008. (Dkt. #49). On December 5, 2008,
5 Petitioner filed a Reply to that Response, a second Motion to Stay pending adjudication of
6 Petitioner's unexhausted claims in state court, and a Reply to the Department of Correction's
7 Objection to Petitioner's Motion for Procedural Order. (Dkt. #s 52-54).

8 After reviewing Respondents' Response to Petitioner's newly-raised allegations, the
9 Court ordered Respondents to file a supplement brief addressing whether the Court should
10 allow Petitioner to amend his Petition to state his alleged Brady violation as a free-standing
11 claim and/or state a claim for ineffective assistance of counsel for failure to investigate the
12 presence of drugs in Petitioner's daughter's system. (Dkt. #55). The Court also directed
13 Respondents to address whether Petitioner would be entitled to a stay to present his claims
14 to the state courts per Rhines v. Weber, 544 U.S. 269, 277 (2005). Respondents filed their
15 supplemental response on January 12, 2009 (Dkt. #59), and Petitioner filed a Reply on
16 January 23, 2009 (Dkt. #62).

17 On December 12, 2008, Magistrate Judge Marshall issued a Report and
18 Recommendation that the Court deny Petitioner's original Motion to Stay Habeas Corpus
19 Proceedings Pending Appeal. (Dkt. #41). Petitioner filed an Objection on January 21, 2009.
20 (Dkt. #60). Then, on January 23, 2009, Petitioner filed a Motion to Amend Writ of Habeas
21 Corpus. (Dkt. #61).

22 On February 11, 2009, the Court adopted Magistrate Judge Marshall's Report and
23 Recommendation denying Petitioner's first Motion To Stay. (Dkt. # 64). The Court further
24 ordered U.S. Magistrate Judge Jacqueline Marshall to issue a Report and Recommendation
25 concerning the motions that remained pending in this action: (1) the Arizona Department of
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27 ¹While this Court has referred to the document filed at Dkt. # 48 as an "Objection," it is in
28 fact captioned as a "Response."

1 Corrections's Objection to the Court's granting Petitioner's Motion for a Procedural Order
2 (Dkt. # 48), (2) Petitioner's Motion to Stay (Dkt. # 53), and (3) Petitioner's Motion to Amend
3 Writ of Habeas Corpus (Dkt. #61). The Court also requested that Judge Marshall report on
4 whether the Court's decision to withhold ruling in part on her initial Report and
5 Recommendation (Dkt. #44) should be deemed moot as a result of Petitioner's Motion to
6 Amend.

7 On August 8, 2009, Magistrate Judge Marshall issued a Report and Recommendation
8 denying Petitioner's Motion to Stay and his Motion to Amend Writ of Habeas Corpus, and
9 denying as moot Arizona Department of Corrections' Objection to the Court's granting
10 Petitioner's Motion for a Procedural Order (Dkt. #67). On September 10, 2009, this Court,
11 concerned that Petitioner, due to a change of address, had not received the Report &
12 Recommendation, directed the Clerk of the Court to resend the Report and Recommendation
13 to the Petitioner, and ordered that Petitioner and Respondent file any objections to the Report
14 and Recommendation within ten days. (Dkt. #69) Petitioner filed an objection to the Report
15 and Recommendation on September 21, 2009. (Dkt. #70)

16 **III. DISCUSSION**

17 **A. Motion to Amend**

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19 In his Motion to Amend Writ of Habeas Corpus, Petitioner prays this Court allow him
20 to amend his original habeas petition to include a claim predicated on Brady v. Maryland,
21 373 U.S. 83 (1963), alleging that the State failed to disclose the criminal backgrounds of two
22 witnesses that testified against him at trial. (Dkt. #67, p.1). Petitioner also wishes to amend
23 his petition to include an ineffective assistance of counsel claim based on his counsel's
24 failure to raise this Brady claim on appeal. Id. Finally, in his objections to a previously filed
25 Report and Recommendation, as well as the instant one, Petitioner suggests that counsel
26 performed ineffectively by failing to independently test and investigate the state's assertions
27 concerning the presence of methamphetamine in his daughter's system. Id. at 2.

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1 The civil rules governing amendments are applicable to habeas cases. Mayle v. Felix,
2 545 U.S. 644, 659 (2005). Under these rules, “[b]efore a responsive pleading is served,
3 pleadings may be amended once as a “matter of course,” i.e., without seeking court leave.”
4 Id. After the responsive pleading has been served, amendments may be made at any time
5 during a proceeding with leave of the court. Id. However, in Mayle the Supreme Court
6 constrained district courts’ discretion concerning the amendment of habeas petitions. It held
7 that after the one-year statute of limitations for filing a habeas petition imposed by the
8 Antiterrorism and Effective Death Penalty Act (AEDPA) has run, proposed amendments
9 must relate back to the claims plead in the original habeas petition. Id.; 28 U.S.C. § 2244(d).

10 **1. Statutory Tolling**

11 The State has responded to Petitioner’s habeas petition. (Dkt. #18). Accordingly,
12 Petitioner may no longer amend his petition without leave of this Court. As a preliminary
13 issue, then, this Court must determine whether its discretion is constrained by the
14 requirements of AEDPA. Under AEDPA, the one-year tolling period runs from the latest of:
15 (1) the date on which the judgement became final; (2) the date on which a state-created
16 impediment from filing has been removed; (3) the date on which the constitutional right
17 asserted was recognized by the Supreme Court; and (4) the date on which the factual
18 predicate of the claim or claims presented could have been discovered through due diligence.
19 28 U.S.C. § 2244(d)(1)(A)–(D)

20 Petitioner’s appeal for statutory tolling appears to be predicated on his discovery of
21 new evidence; evidence that is the factual predicate of his claims. The evidence proffered
22 by Petitioner is: (1) the criminal backgrounds of two witnesses at his trial; and (2) a report
23 concerning the urine and blood testing of Petitioner’s daughter, which calls into question the
24 conclusions of the state lab concerning the amount of methamphetamine in her system. (Dkt.
25 61, p.2–3). Magistrate Judge Marshall concluded that in discovering this evidence
26 Petitioner did not exhibit the requisite diligence. (Dkt. #67, p.5) Petitioner objects to this
27 determination, arguing that at trial his attorney repeatedly requested the state produce
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1 criminal background reports on the witnesses in question, (Dkt. #70, p.5), and that he
2 repeatedly asked both trial and appellate counsel to order an independent laboratory test of
3 his daughters blood and urine. Id. at 5.

4 With respect to the criminal-background evidence, the Court agrees with the
5 conclusions reached by the magistrate. Petitioner is correct, the record does not contain
6 direct evidence that the State turned witness Francis Smith's known arrest history over to
7 Petitioner. The trial transcript shows, however, that trial counsel raised and established Mr.
8 Smith's felony record during cross-examination. (Dkt. #59, ex. U, p.117-119). Thus, even
9 if the state did not turn over a prior conviction history, Petitioner was clearly on notice that
10 such evidence existed or may have existed. Given these facts, the Court believes that
11 Petitioner could have secured this evidence sometime during the four years that passed
12 between his conviction and the filing of his habeas petition. Accordingly, this Court agrees
13 with the Magistrate that "even if the facts underlying the proposed new claim[] w[as]
14 discovered after trial, Petitioner was not dilligent in securing them." (Dkt. #70, p.8).

15 In support of his other new claim for ineffective assistance of counsel, Petitioner has
16 provided the Court with a report by Ed French, who appears to be a faculty member in the
17 Department of Pharmacology at the University of Arizona, that questions the conclusions and
18 questions the methodology of Southwest Laboratories, the laboratory hired by the State to
19 conduct the analysis of Petitioner's daughter's blood and urine. (Dkt. #26, ex.1). Petitioner
20 argues he acted diligently in securing this evidence, as "new scientific methods have been
21 brought forth and were not discovered until the National Academy of Sciences issued its
22 research regarding Forensic Analysis well after the filing of this action." (Dkt. #70, p.8).
23 The Court is sympathetic to Plaintiff's claim that his lawyers rebuffed efforts to secure such
24 testing earlier, by telling him he did "'not know the law' and was not a 'trained
25 professional.'" Id. The fact, however, that Plaintiff ultimately procured such testing on his
26 own suggests that he may have been able to secure the testing earlier, and therefore did not
27 exercise sufficient diligence.
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1 Ultimately, however, the Court need not reach a definitive conclusion concerning
2 Petitioner’s diligence in discovering this evidence. Assuming, *arguendo*, that Plaintiff’s
3 evidence constitutes a new factual predicate for the purposes of AEDPA, 28 U.S.C. §
4 2244(d)(1)(D), Plaintiff did not file his Motion to Amend within the one year statute of
5 limitation provided therein. Plaintiff first brought the evidence in question to the Court’s
6 attention in a filing made on December 28, 2007. See (Dkt. #26, ex.1(Ed French’s Report));
7 Id. at ex. 5–8 (the criminal histories of Francis Smith and Leslie Donald Ray). Assuming
8 further that the date on which this evidence could have been discovered through due
9 diligence was the same as the date on which it was filed, Petitioner would have needed to file
10 his Motion to Amend by December 28, 2008. Petitioner filed the instant Motion to Stay on
11 December 5, 2009, but, importantly, did not file his pending Motion to Amend until January
12 23, 2009; one year and twenty-six days after the latest possible time this Court could find the
13 statute began to run again.

14 Therefore, for purposes of this action, the statute of limitations began to run from the
15 date on which Petitioner’s judgment became final by the conclusion of direct review or the
16 expiration of the time for seeking review. Id.; (Dkt. #67, p.3). In this case, however,
17 Petitioner did not avail himself of state-post conviction procedures. Accordingly, Petitioner’s
18 conviction became final on March April 5, 2005, 90 days after the Arizona Supreme Court
19 denied Petitioner’s petition for review of the trial court’s dismissal of his direct appeal on
20 January 5, 2005². Id.; see Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999) (statute of
21 limitations does not begin to run until close of ninety-day period within which petitioner
22 could have filed a petition for writ of certiorari from the United States Supreme Court).

24 ²In his Objections to the Report and Recommendation, Petitioner appears to read the
25 Magistrate’s Report and Recommendation, however, as suggesting that he failed to file his federal
26 habeas within the one year statute of limitations period. (Dkt. #70, p.2–3). This is incorrect. It is
27 undisputed that petitioner timely filed his federal habeas petition on August 4, 2005 (Dkt. #1).
28 Instead, the Magistrate Judge’s discussion of timeliness and AEDPA’s one-year statute of limitations
 served only to demonstrate that Petitioner is no longer free to amend his habeas petition without
 showing that the newly proposed claims “relate back” to the claims raised in his original timely
 petition. (Dkt. #67, p.3)

1 Accordingly, this Court has no choice but to find that Petitioner is not entitled to statutory
2 tolling.

3 **2. Equitable Tolling**

4 Having found that Petitioner is not entitled to statutory tolling , the Court must now
5 consider whether Petitioner is entitled to equitable tolling. Equitable tolling is available only
6 when “extraordinary circumstances beyond a prisoner’s control make it impossible to file a
7 petition on time.” Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir.1998).
8 “When external forces, rather than a petitioner's lack of diligence, account for the failure to
9 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles
10 v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999). Under AEDPA, “the threshold necessary to
11 trigger equitable tolling is very high, lest the exceptions swallow the rule.” Miranda v.
12 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). Accordingly, cases in which the Ninth Circuit
13 has found extraordinary circumstances are rare and generally limited to those in which a
14 serious mistake by a government official, counsel, or court prejudices the plaintiff. See e.g.,
15 Harris v. Carter, 515 F.3d 1051, 1054–57 (9th Cir. 2008) (petitioner entitled to equitable
16 tolling because he relied on the Ninth Circuit's legally erroneous holding in determining
17 when to file a federal habeas petition); Corjasso v. Ayers, 278 F.3d 874, 877–79 (9th Cir.
18 2002) (equitable tolling warranted where district court mishandles a petition causing it to be
19 untimely).

20 The Magistrate recommended that equitable tolling not be applied in this case. (Dkt.
21 #67, p.5–6). Petitioner objects, arguing that he pursued his rights diligently throughout, but
22 his attorneys thwarted these efforts by failing to raise the issues and conduct the
23 investigations he requested. (Dkt. #70, p.8). Petitioner argues that this diligence, combined
24 with “the extraordinary circumstance of both obtaining scientific information and attempting
25 to retain a competent counsel to take on these issues” justifies equitable tolling. Id. Mindful
26 of the difficulties faced by Plaintiff, this Court does not believe that the circumstances
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1 presented by Petitioner rise to the level of the extraordinary. Therefore, equitable tolling is
2 not justified in this case.

3 **3. Relation Back**

4 Because the statute of limitations has run, this Court must ask whether Petitioner's
5 proposed amendments relate back to the claims in his original petition. Mayle v. Felix, 545
6 U.S. 644, 659 (2005). "An amendment of a pleading relates back to the date of the original
7 pleading when ... the claim ... asserted in the amended pleading arose out of the conduct,
8 transaction, or occurrence set forth or attempted to be set forth in the original pleading."
9 FED.R.CIV.PRO. 15(c)(2). An amended habeas petition, "does not relate back (and thereby
10 escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by
11 facts that differ in both time and type from those the original pleading set forth." Mayle, 545
12 U.S. at 649. Additionally, in Mayle the Supreme Court rejected the notion that the trial itself
13 constitutes the same transaction or occurrence for the purposes of the relates-back test: "If
14 claims asserted after the one-year period could be revived simply because they relate to the
15 same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would
16 have slim significance." Id. at 662.

17 In his original habeas filing, Petitioner plead four grounds for relief: (1) a due process
18 violation stemming from exclusion of defense witnesses; (2) Ineffective Assistance of
19 Counsel (IAC) from counsel's failure to timely disclose defense witnesses; (3) Ineffective
20 Assistance of Counsel from counsel's failure to interview defense witnesses; and (4) a Due
21 process violation stemming from the Arizona Court of Appeals' failure to remand his case
22 to trial court in light of Wiggins v. Smith, 539 U.S. 510 (2003). (Dkt. #1). Petitioner objects
23 to the Magistrate's finding that his new claims do not relate back to any of the four contained
24 in his original petition. (Dkt. #70, p.3-4). This Court, like the Magistrate Judge, does not
25 believe that Plaintiff's newly proposed Brady and IAC claims relate back to his original
26 claims.
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1 The Brady claim is clearly a new ground for relief. It is supported by different facts,
2 both in time and type, then those supporting Petitioner's other claims, as it implicates
3 prosecutorial conduct, whereas the original claims focus on the actions of trial counsel and
4 the trial-court judge. As to his new IAC claims, Petitioner argues they relate back because
5 his habeas petition contained two other IAC claims.. (Dkt. #70, at 4). The Court must reject
6 this argument. Petitioner's new allegations of IAC are unrelated to either of his other IAC
7 allegations. The only relationship between these claims is their accusation of ineffectiveness.
8 Though they may share a common legal theory, they implicate a different set of operative
9 facts, arising out of different instances of conduct. See Mandacina v. U.S., 328 F.3d 995,
10 1002 (8th Cir. 2003) (finding that petitioner's new claim of IAC was different in time and
11 type from the ten counts of IAC alleged in his original petition). Accordingly, this Court
12 must find that Plaintiff's new claims do not relate back to those found in his original petition.

13 **B. Motion For a Stay**

14 In the Report and Recommendation, Magistrate Marshal analyzed Petitioner's Motion
15 for a Stay under the rubric of Rhines v. Weber. 544 U.S. 269 (2205) Under Rhines, in
16 limited circumstances, a federal district court has the discretion to stay a *mixed habeas*
17 *petition* containing exhausted and unexhausted claims to allow the petitioner to present his
18 unexhausted claims to the state court in the first instance, and then return to federal court for
19 review of his perfected petition. 544 U.S. 269. Because this Court has already decided that
20 Petitioner may not amend his habeas petition, his petition is not mixed, and the Rhines
21 analysis is inapplicable.

22 Instead, should this court decide to grant a stay, it must do so pursuant to Kelly v.
23 Small, 315 F.3d 1063 (9th Cir. 2003). Under the Kelly three-step procedure (1) a petitioner
24 amends his petition to delete any unexhausted claims; (2) the court stays and holds in
25 abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity to
26 proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his
27 petition and re-attaches the newly-exhausted claims to the original petition. King v. Ryan,

1 564 F.3d 1133, 1135 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1070–71).” The Rhines and
2 Kelly approaches are distinct because “Rhines applies to stays of mixed petitions, whereas
3 the three-step [Kelly] procedure applies to stays of *fully exhausted petitions*.” Jackson v.
4 Roe, 425 F.3d 654 (9th Cir. 2005); see also King, 564 F.3d at 1140 (“[T]he three-step
5 procedure outlined in Kelly allows the stay of *fully exhausted* petitions).” Additionally,
6 unlike a stay predicated on Rhines, a Kelly stay “does nothing to protect a petitioner’s
7 unexhausted claims from untimeliness in the interim.” King, 564 F.3d at 1141.

8 This Court acknowledges that Petitioner did not start on the same procedural ground
9 as the normal Kelly petitioner; with a mixed petition. Petitioner is, however, in the same
10 procedural posture as any Kelly-petitioner that has taken step-one; he possesses a fully
11 exhausted habeas claim and prays that the Court grant a stay. Accordingly, the Court
12 believes the rules governing Kelly apply in the instant case. And, when faced with a fully
13 exhausted petition at Kelly step-two, a district court still retains discretion concerning
14 whether or not to grant a stay. Kelly, 315 F.3d at 1070. A stay is clearly appropriate when
15 declining to do so would cause otherwise valid claims to be forfeited. Id. Conversely, the
16 Ninth Circuit also recognizes that a Court may properly deny staying an exhausted habeas
17 petition when Mayle’s relation-back requirement would prevent the petitioner from ever
18 successfully amending his claim. King, 564 F.3d. at 1141–2. In King, the Ninth Circuit
19 upheld a district court’s decision not to grant a Kelly-stay where that court did not believe
20 “that any of petitioner’s unexhausted claims would relate back to the date of petitioner’s
21 original filing,” as required by Mayle. Id. at 1142.

22 This Court has already concluded in this Order that Petitioner’s unexhausted claims
23 do not relate back to the claims made in his original petition. Therefore, granting Petitioner’s
24 Motion for a Stay could never lead to him eventually being permitted to amend his habeas
25 petition to include these new claims. Accordingly, this Court, following the logic set forth
26 in King, declines to exercise its discretion to grant a stay, as doing so would only result in
27 unnecessary delay in adjudicating the claims properly before this court.
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C. The Previous Report and Recommendation

In a previous Report and Recommendation, Magistrate Judge Marshall concluded that Petitioner’s habeas petition should be dismissed. (Dkt. #37). In an a subsequent Order, this Court, conducting a *de novo* review of the Report and Recommendation, reached the same conclusion concerning Petitioner’s habeas petition. (Dkt. #44). In order to give full consideration to Petitioner’s Motion for a Stay, however, this Court abstained from fully adopting Magistrate Marshall’s previous Report and Recommendation. Id. Now that the Court has fully addressed Petitioner’s Motion for a Stay and Motion to Amend, and dismissed them, the Court no longer has reason for withholding final action on Petitioner’s habeas petition.

Accordingly,

IT IS HEREBY ORDERED adopting the Magistrate Judge Marshall’s Report and Recommendation (Dkt. #67) to the extent it is consistent with this Order.

IT IS FURTHER ORDERED denying Petitioner’s Motion to Stay (Dkt. #53)

IT IS FURTHER ORDERED denying Petitioner’s Motion to Amend Writ of Habeas Corpus (Dkt. #61)

IT IS FURTHER ORDERED denying as moot Arizona Department of Corrections’ Objection to the Court’s granting Petitioner’s Motion for a Procedural Order (Dkt.# 48).

IT IS FURTHER ORDERED adopting in full Magistrate Judge’s Marshall’s previous Report and Recommendation (Dkt. #37) to the extent it is consistent with the Court’s Order conducting a *de novo* review (Dkt. #44).

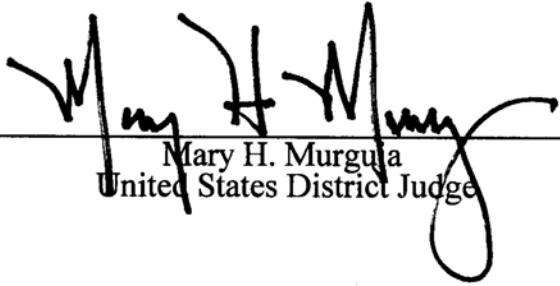
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IT IS FURTHER ORDERED denying Petitioners's habeas petition (Dkt. #1).

IT IS FURTHER ORDERED directing the Clerk of the Court to close this case.

DATED this 30th day of September, 2009



Mary H. Murgula
United States District Judge