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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GEORGE JACOBS IV,	)	1:11-cv-00934-SKO-HC
	)	
Petitioner,	)	ORDER GRANTING PETITIONER'S
	)	MOTION TO AMEND THE PETITION TO
	)	WITHDRAW UNEXHAUSTED CLAIMS
v.	)	(DOC. 13)
	)	
SUSAN HUBBARD, Warden, et al.,	)	ORDER GRANTING PETITIONER'S
	)	MOTION FOR STAY AND ABEYANCE
Respondents.	)	(DOC. 13) AND STAYING THE
	)	PROCEEDINGS PENDING EXHAUSTION OF
	)	STATE COURT REMEDIES

ORDER DIRECTING PETITIONER TO  
FILE STATUS REPORTS EVERY THIRTY  
(30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on June 17, 2011 (doc. 5). Pending before the Court is Petitioner's motion, filed on October 3, 2011, to withdraw the unexhausted claims in the petition and for a stay and abeyance of the fully exhausted petition pending exhaustion of state court remedies as to the withdrawn claims.

1           I. Motion to Withdraw Unexhausted Claims

2           Petitioner alleges four claims in the petition: 1) with  
3 respect to Petitioner's conviction in count two of battery by a  
4 prisoner on a non-confined person in violation of Cal. Pen. Code  
5 § 4501.5, the evidence failed to establish that Petitioner  
6 wilfully touched the victim in a harmful offensive manner; 2) a  
7 concurrent prison term imposed on count four, possession of a  
8 deadly and dangerous weapon by an inmate in violation of Cal.  
9 Pen. Code § 4502(a), must be stayed because the evidence failed  
10 to demonstrate that Petitioner possessed a sharp instrument at  
11 any time other than when assaulted and battered correctional  
12 officers; 3) the trial court abused its discretion by imposing a  
13 consecutive sentence on count six, aggravated assault while  
14 serving a life sentence in violation of Cal. Pen. Code § 4500,  
15 instead of imposing a concurrent term; and 4) Petitioner's  
16 sentence constituted cruel and unusual punishment under the state  
17 and federal constitutions. (Pet. 6-9.)

18           Petitioner conceded that he did not exhaust state court  
19 remedies as to his second claim concerning the absence of  
20 evidence to demonstrate Petitioner's possession of a sharp  
21 instrument, and as to his third claim concerning the consecutive  
22 term. (Doc. 9, 3.) In response to the Court's order of August  
23 24, 2011, Petitioner has moved in accordance with the Court's  
24 order to withdraw the unexhausted claims and to stay the  
25 proceedings on the fully exhausted claims pending exhaustion of  
26 state court remedies.

27           Accordingly, Petitioner's motion to amend the petition to  
28 withdraw the unexhausted claims will be granted.

1           II. Motion for Stay of the Proceedings

2           Petitioner moves to stay the petition pursuant to Kelly v.  
3 Small, 315 F.3d 1063 (9th Cir. 2003).

4           A district court has discretion to stay a petition which it  
5 may validly consider on the merits. Rhines v. Weber, 544 U.S.  
6 269, 276 (2005); King v. Ryan, 564 F.3d 1133, 1138-39 (9th Cir.  
7 2009). A petition may be stayed either under Rhines, or under  
8 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). King v. Ryan, 564  
9 F.3d 1133, 1138-41 (9th Cir. 2009).

10           In the three-step procedure under Kelly, 1) the petitioner  
11 files an amended petition deleting the unexhausted claims; 2) the  
12 district court stays and holds in abeyance the fully exhausted  
13 petition; and 3) the petitioner later amends the petition to  
14 include the newly exhausted claims. See, King v. Ryan, 564 F.3d  
15 1133, 1135 (9th Cir. 2009). However, the amendment is only  
16 allowed if the additional claims are timely. Id. at 1140-41.

17           In this case, Petitioner meets the qualifications for a  
18 Kelly stay. The petition contained two unexhausted claims which  
19 have been withdrawn. Thus, the instant petition is already  
20 exhausted, and the first step of the Kelly procedure is complete.

21           Therefore, the Court will stay the proceedings according to  
22 the second step of the Kelly procedure. Petitioner will be  
23 instructed to file status reports of his progress through the  
24 state courts. Once the California Supreme Court renders its  
25 opinion, provided the opinion is a denial of relief, Petitioner  
26 must file an amended petition including all of his exhausted  
27 claims. Petitioner is forewarned that claims may be precluded as  
28 untimely if they do not comport with the statute of limitations

1 set forth in 28 U.S.C. § 2244(d).<sup>1</sup>

2 III. Disposition

3 Accordingly, it is ORDERED that:

4 1) Petitioner's motion to amend the petition to withdraw  
5 the unexhausted claims is GRANTED; and

6 2) Petitioner's motion for stay of the proceedings is  
7 GRANTED pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir.  
8 2003); and

9 3) The proceedings are STAYED pending exhaustion of state  
10 remedies; and

11 4) Petitioner is DIRECTED to file a status report of his  
12 progress in the state courts within thirty (30) days, and then  
13 every thirty (30) days thereafter until exhaustion is complete;  
14 and

15 5) Within thirty (30) days after the final order of the  
16 California Supreme Court, Petitioner MUST FILE an amended  
17 petition in this Court including all exhausted claims.

18 Petitioner is forewarned that failure to comply with this  
19 Order will result in the Court's vacating the stay.

20  
21 IT IS SO ORDERED.

22 **Dated: December 9, 2011**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**

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24 \_\_\_\_\_  
25 <sup>1</sup>Petitioner states in his motion that the statute of limitations should  
26 not bar Petitioner's return to this Court with the newly exhausted claims.  
27 (Doc. 13, 2-3.) In this regard, the Court notes that it is unclear whether  
28 Petitioner will have sufficient time to be able to exhaust his unexhausted  
claims. However, no statute of limitations protection is imparted in a  
King/Kelly stay, nor are the exhausted claims adjudicated in this Court during  
the pendency of such a stay. Further, the undersigned is not making any  
determination at this time that Petitioner can timely exhaust any claims prior  
to the expiration of the statute of limitations.