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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

SURGIO VALENCIA BALTAZAR,

 Petitioner,

 v.

WARDEN PAUL BRAZELTON,

 Respondent.

Case No. 1:13-cv-01538-BAM-HC

ORDER DISCHARGING ORDER TO SHOW
CAUSE (DOC. 9)

ORDER GRANTING IN PART PETITIONER'S
MOTION FOR A STAY OF THE
PROCEEDINGS (DOC. 10)

ORDER GRANTING PETITIONER THIRTY
(30) DAYS FROM THE DATE OF SERVICE
OF THIS ORDER TO WITHDRAW HIS
UNEXHAUSTED CLAIM/S IN ORDER TO
OBTAIN A KELLY STAY OF THE
EXHAUSTED CLAIMS IN THE PETITION

INFORMATIONAL ORDER TO PETITIONER
CONCERNING DISMISSAL IF UNEXHAUSTED
CLAIMS ARE NOT WITHDRAWN

 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 his consent in a writing signed by
the Petitioner and filed by Petitioner on September 16, 2013.
Pending before the Court is the Court's order to Petitioner to show

1 cause why the petition should not be dismissed for failure to
2 exhaust state court remedies, which issued on October 17, 2013, as
3 well as Petitioner's motion for a stay, which was filed on October
4 21, 2013.

5 I. Background

6 In the petition, Petitioner alleges that he is an inmate of the
7 Pleasant Valley State Prison serving a sentence of twenty-two years
8 and four months imposed in Merced County Superior Court case number
9 MF4901 or MF49001 on or about May 9, 2011, for various offenses,
10 including possession of a firearm by a felon. Petitioner raises the
11 following claims in the petition: 1) the evidence of Petitioner's
12 having suffered a prior felony conviction was insufficient or,
13 alternatively, was taken in violation of state law, Petitioner's
14 state statutory right to trial by jury, and Petitioner's federal
15 right to due process of law; and 2) court security fees and
16 government code section fees imposed by state law must be reduced at
17 least with respect to some counts because state laws imposing the
18 fees did not go into effect until after the offense was committed
19 and because it violated Petitioner's rights under the Eighth
20 Amendment. (Pet. 1-28.)

21 Petitioner attached a copy of a petition for review filed in
22 the California Supreme Court which included discussion of
23 Petitioner's first claim or claims. However, Petitioner did not
24 attach documentation reflecting that Petitioner raised his second
25 claim or claims, which were not included in the attached petition
26 for review, before the California Supreme Court; further, he alleged
27 that he filed no habeas petitions in any state court with respect to
28 the challenged judgment of conviction. (Id. at 3.) Although

1 Petitioner alleged that he raised the second claim or claims before
2 the California Supreme Court (id. at 6), his petition for review did
3 not include discussion of that issue (id. at 16-31). Petitioner did
4 not specifically describe or document the proceedings in the state
5 courts in which he exhausted his second claim or claims. Thus,
6 Petitioner was given an opportunity to establish exhaustion of
7 administrative remedies as to his second claim.

8 On October 31, 2013, Petitioner filed a motion to stay this
9 proceeding in order to permit Petitioner to exhaust state court
10 remedies as to any issue incorrectly presented to this Court as well
11 as additional issues that were not raised on Petitioner's direct
12 appeal. (Doc. 10, 1-2.) Petitioner submits with his motion a copy
13 of a petition that he is submitting to the Superior Court of the
14 State of California, County of Merced, in which he raises the
15 following claims: 1) Petitioner's rights under the Fifth Amendment
16 and the Miranda decision were violated by use of Petitioner's second
17 statement to police; 2) the evidence is insufficient to support two
18 convictions of firearms offenses in violation of Petitioner's right
19 to due process of law; 3) Petitioner's conviction should be reversed
20 because the court took judicial notice of a prior conviction in
21 violation of Petitioner's right to have the issue tried by a jury;
22 4) evidence of Petitioner's prior sex crimes was inadmissible under
23 Cal. Evid. Code § 1102; 5) trial counsel was ineffective for failure
24 to move to bifurcate the proceedings regarding the prior conviction;
25 and 6) appellate counsel was ineffective for failing to raise the
26 previously listed issues on appeal. (Doc. 10, 2, 7-20.)

27 II. Discharge of the Order to Show Cause

28 Because Petitioner has timely responded, the order to show

1 cause that issued on October 17, 2013, is DISCHARGED.

2 III. Exhaustion of State Court Remedies

3 A petitioner who is in state custody and wishes to challenge
4 collaterally a conviction by a petition for writ of habeas corpus
5 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
6 exhaustion doctrine is based on comity to the state court and gives
7 the state court the initial opportunity to correct the state's
8 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
9 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v.
10 Sunn, 854 F.2d 1158, 1162-63 (9th Cir. 1988).

11 A petitioner can satisfy the exhaustion requirement by
12 providing the highest state court with the necessary jurisdiction a
13 full and fair opportunity to consider each claim before presenting
14 it to the federal court, and demonstrating that no state remedy
15 remains available. Picard v. Connor, 404 U.S. 270, 275-76 (1971);
16 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court
17 will find that the highest state court was given a full and fair
18 opportunity to hear a claim if the petitioner has presented the
19 highest state court with the claim's factual and legal basis.
20 Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v.
21 Tamayo-Reyes, 504 U.S. 1, 9-10 (1992), superceded by statute as
22 stated in Williams v. Taylor, 529 U.S. 362 (2000) (factual basis).

23 Additionally, the petitioner must have specifically told the
24 state court that he was raising a federal constitutional claim.
25 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
26 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala v.
27 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood, 133 F.3d
28 1240, 1241 (9th Cir. 1998). In Duncan, the United States Supreme

1 Court reiterated the rule as follows:

2 In Picard v. Connor, 404 U.S. 270, 275...(1971),
3 we said that exhaustion of state remedies requires that
4 petitioners "fairly presen[t]" federal claims to the
5 state courts in order to give the State the
6 "'opportunity to pass upon and correct' alleged
7 violations of the prisoners' federal rights" (some
8 internal quotation marks omitted). If state courts are
9 to be given the opportunity to correct alleged violations
10 of prisoners' federal rights, they must surely be
11 alerted to the fact that the prisoners are asserting
12 claims under the United States Constitution. If a
13 habeas petitioner wishes to claim that an evidentiary
14 ruling at a state court trial denied him the due
15 process of law guaranteed by the Fourteenth Amendment,
16 he must say so, not only in federal court, but in state
17 court.

18 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
19 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000),
20 as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
21 2001), stating:

22 Our rule is that a state prisoner has not "fairly
23 presented" (and thus exhausted) his federal claims
24 in state court unless he specifically indicated to
25 that court that those claims were based on federal law.
26 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
27 2000). Since the Supreme Court's decision in Duncan,
28 this court has held that the petitioner must make the
federal basis of the claim explicit either by citing
federal law or the decisions of federal courts, even
if the federal basis is "self-evident," Gatlin v. Madding,
189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
Harless, 459 U.S. 4, 7... (1982), or the underlying
claim would be decided under state law on the same
considerations that would control resolution of the claim
on federal grounds, see, e.g., Hiivala v. Wood, 195
F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
at 865.

...

In Johnson, we explained that the petitioner must alert
the state court to the fact that the relevant claim is a
federal one without regard to how similar the state and

1 federal standards for reviewing the claim may be or how
2 obvious the violation of federal law is.

3 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as amended
4 by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir. 2001).

5 Where none of a petitioner's claims has been presented to the
6 highest state court as required by the exhaustion doctrine, the
7 Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d
8 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th
9 Cir. 2001). The authority of a court to hold a mixed petition in
10 abeyance pending exhaustion of the unexhausted claims has not been
11 extended to petitions that contain no exhausted claims. Raspberry,
12 448 F.3d at 1154.

13 Here, Petitioner does not dispute that he failed to exhaust
14 state court remedies as to one of the claims in his petition.

15 III. Motion for a Stay

16 Petitioner asks for a stay and abeyance of the petition and
17 leave to amend his petition once the issues pending in the habeas
18 proceeding in the state court are exhausted. Petitioner asserts
19 that his additional claims will be filed within a one-year period
20 after the California Supreme Court's denial of his petition for
21 review. (Doc. 10, 2.) Petitioner states no basis for a stay other
22 than his ongoing state court proceedings and his anticipation of a
23 quick course of exhaustion of judicial remedies throughout the state
24 court system. In his state court petition, he states that his
25 appellate counsel failed to raise these issues on direct appeal.
26 (Id. at 18.)

27 A district court has discretion to stay a petition which it may
28 validly consider on the merits. Rhines v. Weber, 544 U.S. 269, 276

1 (2005); King v. Ryan, 564 F.3d 1133, 1138-39 (9th Cir. 2009), cert.
2 den., 558 U.S. 887. A petition may be stayed either under Rhines,
3 or under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). King v.
4 Ryan, 564 F.3d at 1138-41.

5 Under Rhines, the Court has discretion to stay proceedings;
6 however, this discretion is circumscribed by the Antiterrorism and
7 Effective Death Penalty Act of 1996 (AEDPA). Rhines, 544 U.S. at
8 276-77. In light of AEDPA's objectives, "stay and abeyance [is]
9 available only in limited circumstances" and "is only appropriate
10 when the district court determines there was good cause for the
11 petitioner's failure to exhaust his claims first in state court."
12 Id. at 277-78. A stay of a mixed petition pursuant to Rhines is
13 required only if 1) the petitioner has good cause for his failure to
14 exhaust his claims in state court; 2) the unexhausted claims are
15 potentially meritorious; and 3) there is no indication that the
16 petitioner intentionally engaged in dilatory litigation tactics.
17 Id.

18 A petition may also be stayed pursuant to the procedure set
19 forth by the Ninth Circuit in Kelly v. Small, 315 F.3d 1063 (9th
20 Cir. 2003). Under this three-step procedure: 1) the petitioner
21 files an amended petition deleting the unexhausted claims; 2) the
22 district court stays and holds in abeyance the fully exhausted
23 petition; and 3) the petitioner later amends the petition to include
24 the newly exhausted claims. See, King v. Ryan, 564 F.3d 1133, 1135
25 (9th Cir. 2009). However, the amendment is only allowed if the
26 additional claims are timely. Id. at 1140-41.

27 A stay under Rhines permits a district court to stay a mixed
28 petition and does not require that unexhausted claims be dismissed

1 while the petitioner attempts to exhaust them in state court. In
2 contrast, a stay pursuant to the three-step Kelly procedure allows a
3 district court to stay a fully exhausted petition, and it requires
4 that any unexhausted claims be dismissed. Jackson v. Roe, 425 F.3d
5 654, 661 (9th Cir. 2005). In this circuit it is recognized that the
6 Kelly procedure remains available after the decision in Rhines and
7 is available without a showing of good cause. King v. Ryan, 564
8 F.3d at 1140.

9 Here, it is unclear whether Petitioner seeks a stay under Kelly
10 or Rhines. Petitioner cites to Rhines. If Petitioner does seek a
11 stay pursuant to Rhines, it does not appear that Petitioner has
12 shown good cause. The Supreme Court has not articulated what
13 constitutes good cause under Rhines, but it has stated that “[a]
14 petitioner's reasonable confusion about whether a state filing would
15 be timely will ordinarily constitute ‘good cause’ for him to file” a
16 “protective” petition in federal court. Pace v. DiGuglielmo, 544
17 U.S. 408, 416 (2005). The Ninth Circuit has held that the standard
18 is a less stringent one than that for good cause to establish
19 equitable tolling, which requires that extraordinary circumstances
20 beyond a petitioner's control be the proximate cause of any delay.
21 Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). The Ninth
22 Circuit has recognized, however, that “a stay-and-abeyance should be
23 available only in limited circumstances.” Id. at 661 (internal
24 quotation marks omitted); see, Wooten v. Kirkland, 540 F.3d 1019,
25 1024 (9th Cir. 2008), cert. denied, --- U.S. ----, 129 S.Ct. 2771,

1 174 L.Ed.2d 276 (2009) (concluding that a petitioner's impression
2 that counsel had exhausted a claim did not demonstrate good cause).

3 Here, Petitioner's single unexhausted claim in the petition
4 regarding court security fees and government code section fees
5 appears to have been available to Petitioner during the trial and
6 appeal proceedings in state court. Likewise, it appears that
7 Petitioner had an opportunity to exhaust state court remedies as to
8 the additional claims he seeks to add to the petition after
9 exhaustion of state court remedies, which concern the Fifth
10 Amendment, insufficiency and inadmissibility of the evidence, and
11 the ineffective assistance of counsel.
12
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14 The Court concludes that Petitioner has not shown that he is
15 entitled to a Rhines stay.

16 A Kelly stay is effected in three steps: 1) the petitioner
17 must file an amended petition deleting the unexhausted claims; 2)
18 the district court will stay and hold in abeyance the fully
19 exhausted petition; and 3) the petitioner will later amend the
20 petition to include the newly exhausted claims. See, King v. Ryan,
21 564 F.3d at 1135. However, the amendment is only allowed if the
22 additional claims are timely. Id. at 1140-41.

23 The Court notes that it is unclear whether Petitioner will have
24 sufficient time to be able to exhaust his unexhausted claims.
25 However, no statute of limitations protection is imparted in a
26 King/Kelly stay, nor are the exhausted claims adjudicated in this
27 Court during the pendency of such a stay. Further, the undersigned
28 is not making any determination at this time that Petitioner can

1 timely exhaust any claims prior to the expiration of the statute of
2 limitations.

3 Here, Petitioner exhausted his first claim or claim, but his
4 second claim or claims have not been exhausted. Petitioner will be
5 given an opportunity to withdraw the second claim or claims, as to
6 which state court remedies are unexhausted, and to have the fully
7 exhausted petition stayed pending exhaustion of the other claims in
8 state court. The Court must dismiss the petition without prejudice
9 unless Petitioner withdraws the unexhausted claims and proceeds with
10 the exhausted claims in lieu of suffering dismissal.

11 IV. Disposition of the Motion for a Stay

12 In accordance with the foregoing analysis, it is hereby
13 ORDERED that:

14 1) Petitioner's request for a stay is GRANTED in part, and
15 Petitioner is GRANTED leave to seek a stay pursuant to Kelly v.
16 Small; and

17 2) Petitioner is GRANTED thirty (30) days from the date of
18 service of this order to file a motion to withdraw his unexhausted
19 claim/s and to seek a stay of the fully exhausted petition; and

20 3) Petitioner is INFORMED that in the event Petitioner does not
21 file such a motion, the Court will assume Petitioner desires to
22 return to state court to exhaust the unexhausted claims and will
23 therefore dismiss the entire petition without prejudice.

24 Petitioner is further INFORMED that a dismissal for failure to
25 exhaust will not itself bar him from returning to federal court
26 after exhausting his available state remedies. However, Petitioner
27 may still be subject to the one-year statute of limitations imposed
28

1 by 28 U.S.C. § 2244(d). Although the limitations period is tolled
2 while a properly filed request for collateral review is pending in
3 state court, 28 U.S.C. § 2244(d)(2), it is not tolled for the time
4 an application is pending in federal court, Duncan v. Walker, 533
5 U.S. 167, 172 (2001).
6

7
8 IT IS SO ORDERED.

9 Dated: January 3, 2014

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE