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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 GRANTING PETITIONER'S MOTION
TO AMEND THE PETITION TO WITHDRAW
UNEXHAUSTED CLAIMS (DOC. 14)

ORDER GRANTING PETITIONER'S MOTION
FOR STAY AND ABEYANCE (DOC. 10)

ORDER DIRECTING PETITIONER TO FILE
STATUS REPORTS EVERY THIRTY (30)
DAYS AND AN AMENDED PETITION UPON
COMPLETION OF EXHAUSTION

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 Petitioner's motion to withdraw from his petition unexhausted claims, which was filed on January 13, 2014, in response to the Court's order of January 3, 2014, conditionally granting a Kelly stay of the proceedings if Petitioner withdrew his

1 unexhausted claim/s.¹

2 I. Motion to Withdraw Unexhausted Claims

3 In the petition, Petitioner raised the following claims: 1) the
4 evidence of Petitioner's having suffered a prior felony conviction
5 was insufficient or, alternatively, was taken in violation of state
6 law, Petitioner's state statutory right to trial by jury, and
7 Petitioner's federal right to due process of law; and 2) court
8 security fees and government code section fees imposed by state law
9 must be reduced at least with respect to some counts because state
10 laws imposing the fees did not go into effect until after the
11 offense was committed and because it violated Petitioner's rights
12 under the Eighth Amendment. (Pet. 1-28.) The second claim was
13 unexhausted.

14 In the motion before the Court, Petitioner seeks to withdraw
15 his unexhausted claim. The Court understands the motion to be to
16 withdraw Petitioner's claim or claims concerning the court security
17 fees and government code section fees imposed by state law.

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

20 II. Petitioner's Motion for a Stay of the Proceedings

21 In the three-step procedure under Kelly, 1) the petitioner
22 files an amended petition deleting the unexhausted claims; 2) the
23 district court stays and holds in abeyance the fully exhausted
24 petition; and 3) the petitioner later amends the petition to include
25 the newly exhausted claims. See, King v. Ryan, 564 F.3d 1133, 1135
26 (9th Cir. 2009). However, the amendment is only allowed if the
27 additional claims are timely. Id. at 1140-41.

28 ¹ The reference is to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003).

1 In this case, Petitioner meets the qualifications for a Kelly
2 stay. The petition contained an unexhausted claim or claims, which
3 have been withdrawn. Thus, the instant petition is already
4 exhausted, and the first step of the Kelly procedure is complete.
5 Therefore, the Court will stay the proceedings according to the
6 second step of the Kelly procedure. Petitioner will be instructed
7 to file status reports of his progress through the state courts.
8 Once the California Supreme Court renders its opinion, provided the
9 opinion is a denial of relief, Petitioner must file an amended
10 petition including all of his exhausted claims. He is forewarned
11 that claims may be precluded as untimely if they do not comport with
12 the statute of limitations set forth in 28 U.S.C. § 2244(d).

13 III. Disposition

14 Accordingly, it is ORDERED that:

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

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

19 3) The proceedings are STAYED pending exhaustion of state
20 remedies; and

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

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

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

3 IT IS SO ORDERED.

4 Dated: March 12, 2014

/s/ Barbara A. McAuliffe
5 UNITED STATES MAGISTRATE JUDGE

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