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

XIONG YENG,

 Petitioner,

 v.

RICK HILL, Warden,

 Respondent.

Case No. 1:13-cv-01734-AWI-BAM-HC

ORDER GRANTING PETITIONER'S MOTION
FOR A STAY (DOC. 12)

ORDER STAYING THE PROCEEDINGS
PENDING EXHAUSTION OF STATE COURT
REMEDIES

ORDER DIRECTING PETITIONER TO FILE
AN INITIAL STATUS REPORT IN SIXTY
(60) DAYS, THEN FILE A STATUS
REPORT EVERY NINETY (90) DAYS
THEREAFTER

ORDER DIRECTING PETITIONER TO FILE
AN AMENDED PETITION NO LATER THAN
THIRTY (30) DAYS AFTER COMPLETING
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. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is Petitioner's motion for a stay of the proceedings filed by Petitioner on June 6, 2014.

I. Background

Petitioner attacks his sentence of fifteen years to life with

1 the possibility of parole for attempted murder with use of a
2 firearm, plus a concurrent term of seven years for shooting into an
3 inhabited vehicle. Petitioner was convicted as an accessory, and he
4 challenges the sentence as unlawful and unconstitutional because it
5 is based on liability greater than that of the principal, who
6 pursuant to a plea agreement was convicted of shooting into an
7 inhabited vehicle. Petitioner initially alleged the following
8 claims: 1) trial counsel was ineffective in failing to object to
9 and otherwise defend against the unlawful sentence (id. at 35)); 2)
10 Petitioner's sentence violated Cal. Pen. Code §§ 647, 689, 187, and
11 12022, Cal. Evid. Code § 1111, and art. I, § 17 and the equal
12 protection and due process provisions of the California constitution
13 (id. at 41-42, 66-70); 3) Petitioner was subjected to an excessive
14 and disproportionate sentence in violation of the Eighth Amendment
15 because he was innocent of causing a death or of gross negligence,
16 and his sentence was tantamount to a sentence of life without the
17 possibility of parole given his life expectancy of sixty-four years,
18 which is constitutionally prohibited for non-homicide offenses, (id.
19 at 49-62, 70, 77-79); 4) principles of equity, equal protection, and
20 due process mandate amendment of Petitioner's sentence (id. at 66-
21 70); and 5) there was insufficient evidence that the principal
22 committed attempted murder, and the court made no finding that the
23 principal committed attempted murder (id. at 71-76).

24 On October 29, 2014, Petitioner's second set of claims were
25 dismissed without leave to amend because they were based solely on
26 state law. The matter was referred back to the Magistrate Judge for
27 consideration of Petitioner's motion for a stay.

28 In the motion, Petitioner seeks a stay to "federalize" his

1 dismissed claims on the ground that the federal and state law are
2 similar, and he can exhaust state court remedies as to analogous
3 federal claims and then seek to amend the petition to add the new
4 claims. (Docs. 12 & 13.)

5 II. Motion for a Stay

6 Petitioner's second claim or, more accurately, set of claims,
7 includes challenges to his sentence on some grounds that are based
8 solely on state statutory law, such as alleged violations of Cal.
9 Pen. Code §§ 647, 689, 187, and 12022, and Cal. Evid. Code § 1111.
10 As to these claims, amendment would be futile because state law
11 could never provide the basis of a tenable federal claim.

12 Petitioner's second set of claims also includes challenges based on
13 art. I, § 17, the equal protection clause, and the due process
14 provisions of the California constitution. It appears that
15 Petitioner contemplates raising claims based on analogous provisions
16 of the Federal Constitution after exhausting state court remedies.

17 Petitioner seeks to proceed pursuant to the three-step
18 procedure under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003)
19 (Kelly), in which 1) the petitioner files an amended petition
20 deleting the unexhausted claims; 2) the district court stays and
21 holds in abeyance the fully exhausted petition; and 3) the
22 petitioner later amends the petition to include the newly exhausted
23 claims. See, King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009).
24 However, the amendment is only allowed if the additional claims are
25 timely. Id. at 1140-41.

26 In this case, Petitioner meets the qualifications for a Kelly
27 stay. The petition presently contains no unexhausted claims, so the
28 first step of the Kelly procedure is complete. Therefore, the Court

1 will stay the proceedings according to the second step of the Kelly
2 procedure. Petitioner will be instructed to file status reports of
3 his progress through the state courts. Once the California Supreme
4 Court renders its opinion, provided the opinion is a denial of
5 relief, Petitioner must file an amended petition including all of
6 his exhausted claims. He is forewarned that claims may be precluded
7 as untimely if they do not comport with the statute of limitations
8 set forth in 28 U.S.C. § 2244(d).

9 III. Disposition

10 In accordance with the foregoing, it is ORDERED that:

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

13 2) The proceedings are STAYED pending exhaustion of state
14 remedies; and

15 3) Petitioner is DIRECTED to file an initial status report of
16 his progress in the state courts no later than sixty (60) days after
17 the date of service of this order, and then to file periodic status
18 reports every ninety (90) days thereafter until exhaustion is
19 complete; and

20 4) No later than thirty (30) days after service of the final
21 order of the California Supreme Court, Petitioner MUST FILE an
22 amended petition in this Court including all exhausted claims.

23 Petitioner is forewarned that failure to comply with this order
24 will result in the Court's vacating the stay.

25 IT IS SO ORDERED.

26 Dated: November 3, 2014

27 /s/ Barbara A. McAuliffe
28 UNITED STATES MAGISTRATE JUDGE