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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT LEE GRIFFIN,
Petitioner,

v.

JOEL D. MARTINEZ,
Respondent.

Case No. 1:17-cv-01137-DAD-MJS (HC)
**FINDINGS AND RECOMMENDATIONS TO
GRANT PETITIONER’S MOTION TO STAY**

(ECF No. 9)

FOURTEEN-DAY OBJECTIONS DEADLINE

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a January 15, 2014 conviction from the Fresno County Superior Court on two counts of lewd and lascivious acts on a child and one count of sexual penetration of a child 10 years old or younger. (ECF No. 1.)

The petition presents the following three¹ claims for relief: (1) Petitioner’s due process rights were violated when the state court admitted data and images seized from

¹ The form attached to the petition lists four claims for relief (ECF No. 1 at 8-22). However, the actual petition, including memorandum and points of law, identifies only three claims for relief (*id.* at 38-52). The third claim has two parts and perhaps explains Petitioner’s reference to four claims.

1 Petitioner's computer and evidence of his prior misdemeanor conviction; (2) Petitioner's
2 due process rights were violated when the state court allowed the jury to be instructed
3 with CALCRIM No. 1193 (child sexual abuse accommodation syndrome ("CSAAS"))
4 expert testimony may be considered in evaluating credibility of alleged victims); and (3)
5 Petitioner's right to present a complete defense and his due process rights were violated
6 when the state court excluded evidence of victim's prior molestation.

7 Petitioner filed the instant habeas petition on August 23, 2017. (ECF No. 1.) On
8 August 25, 2017, the Court ordered Respondent to file a response. (ECF No. 3.) On
9 October 12, 2017, Petitioner filed a motion to stay the petition. (ECF No. 9.) In the
10 motion, Petitioner argues that his case should be stayed pursuant to Rhines v. Weber,
11 544 U.S. 276 (2005) and 28 U.S.C. § 2254(e)(2)(A)(ii) because impeachment material
12 he requested from his trial prosecutor three and a half years ago was only recently
13 received. (ECF No. 9.) Neither the motion nor reply briefs describe the content of the
14 material or Petitioner's efforts to exhaust the state petition. (ECF Nos. 9; 14.)

15 Respondent opposes the motion, arguing Petitioner has not demonstrated good
16 cause for a stay. Plaintiff filed his habeas petition more than thirteen months before the
17 statute of limitations would have required him to do so. Unable to explain why he
18 "rushed" to file, he is also unable to show good cause for a stay now.

19 Concurrent with the opposition to the motion to stay, Respondent filed an answer
20 to the petition. (ECF No. 10.) Petitioner did not file a traverse.

21 On January 10, 2018, the Court ordered Petitioner to show cause why the motion
22 to stay should not be denied for failure to identify the unexhausted claims Petitioner
23 wishes to pursue in state court. (ECF No. 15.) Petitioner was given thirty days to respond
24 to the order to show cause. On February 5, 2018, Petitioner responded (ECF No. 16)
25 and declared that he had filed the following four claims in Fresno County Superior
26 Court: (1) That the state court should accept his habeas petition because he only just
27 received documents he had been seeking for three years; (2) Defense counsel failed to
28 investigate the prosecution's witnesses; (3) Defense counsel failed to impeach the

1 prosecution's witnesses with evidence of arrest records; and (4) Defense counsel failed
2 to properly cross-examine the prosecution's witnesses for bias^{7u}. (Id.)

3 For the reasons outlined below, the Court recommends that a stay be granted.

4 **I. Legal Standard**

5 There are two procedures available to federal habeas petitioners who wish to
6 proceed with claims for relief. Under the Rhines procedure, a district court may stay a
7 petitioner's "mixed petition" (containing both exhausted and unexhausted claims), while
8 petitioner returns to state court to exhaust his unexhausted claims. Rhines v. Weber, 544
9 U.S. 269, 277-78 (2005); see also King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009). A
10 stay under Rhines is appropriate only when petitioner has demonstrated good cause for
11 failing to previously exhaust his claims in state court, and is not available if the
12 unexhausted claims are "plainly meritless," or petitioner has engaged in "abusive
13 litigation tactics or intentional delay." Rhines, 544 U.S. at 277-78. The Kelly procedure
14 has been described by the Ninth Circuit Court of Appeals to involve the following three-
15 step process:

16 (1) petitioner amends his petition to delete any unexhausted claims, (2)
17 the court stays and holds in abeyance the amended, fully exhausted
18 petition, allowing petitioner the opportunity to proceed to state court to
exhaust the deleted claims, and (3) petitioner later amends his petition
and re-attaches the newly-exhausted claims to the original petition.

19 King v. Ryan, 564 F.3d at 1135 (citing Kelly v. Small, 315 F.3d 1063, 1070-71 (9th Cir.
20 2003)).

21 Importantly, "the Kelly procedure . . . is not premised upon a showing of good
22 cause." King, 564 F.3d at 1140. However, "[a] petitioner seeking to use the Kelly
23 procedure will be able to amend his unexhausted claims back into his federal petition
24 once he has exhausted them only if those claims are determined to be timely" under the
25 Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) statute of limitations.²

26 ² AEDPA's limitation period is calculated from the "latest" of four commencement dates. See 28 U.S.C. §
27 2244(d)(1)(A) (date on which the judgment became final); § 2244(d)(1)(B) (date on which the illegal state-
28 action impediment to filing was removed); § 2244(d)(1)(C) (date on which the asserted constitutional right
was initially recognized by the U.S. Supreme Court and made retroactive to cases on collateral review);
(continued...)

1 King, 564 at 1140–41. Thus, the Kelly procedure, in contrast to the Rhines procedure,
2 does not protect a petitioner's unexhausted claims from expiring during a stay and
3 becoming time-barred in federal court. King, 564 F.3d at 1140–41; see also Duncan v.
4 Walker, 533 U.S. 167, 172-75 (2001) (unlike the filing of a state habeas petition, the
5 filing of a federal habeas petition does not toll AEDPA's statute of limitations). “[T]he
6 Kelly procedure, unlike the Rhines procedure, does nothing to protect a petitioner's
7 unexhausted claims from untimeliness in the interim.” King, 564 F.3d at 1141.

8 If a newly exhausted claim is time-barred, it may be added in an amended petition
9 only if it “relates back” to petitioner's original exhausted claims. However, a new claim
10 does not “relate back” to the original petition simply because it arises from “the same
11 trial, conviction, or sentence.” Mayle v. Felix, 545 U.S. 644, 662-64 (2005). Rather, the
12 new claim must be of the same “time and type” as the original exhausted claims, and
13 share a “common core of operative facts” with those claims. Id. at 659.

14 The decisions in both Kelly and Rhines “are directed at solving the same
15 problem—namely, the interplay between AEDPA's one-year statute of limitations and the
16 total exhaustion requirement first articulated in Rose v. Lundy, 455 U.S. 509 (1982).”
17 King, 564 F.3d at 1136.

18 **II. Discussion**

19 While the motion indicates that Petitioner seeks a stay pursuant to Rhines, the
20 three claims raised in the Petition are exhausted. (See ECF No. 1 at 8-10.)³ Because the
21 instant petition is not a “mixed petition,” Rhines is not applicable. King, 564 F.3d at 1140,
22 1143 (“Instead, a petitioner may invoke Kelly's three-step procedure subject only to the
23 requirement that the amendment of any newly exhausted claims back into the petition
24

25 (...continued)
26 and § 2244(d)(1)(D) (date on which the factual predicate of the claim could have been discovered through
27 due diligence).

28 ³ In the answer to the petition, Respondent effectively acknowledges that Petitioner exhausted his existing
three claims in state court. (ECF No. 10 at 8 (“Petitioner’s claims are exhausted only to the extent that he
presented the same factual and legal bases for those claims in state court.”))

1 must satisfy Mayle.”).

2 The district court has discretion to implement stay-and-abeyance under Kelly
3 where the standard for a Rhines stay is not met. King, 564 F.3d at 1143. Under Kelly, the
4 court may stay a petition containing only exhausted claims while allowing the petitioner
5 to proceed to state court to exhaust additional claims. King, 564 F.3d at 1135 (citing
6 Kelly, 315 F.3d at 1070-71). The instant petition, asserting only exhausted claims,
7 satisfies the first step under Kelly. As set forth above, the Court is not required to find
8 good cause to proceed to the second step of Kelly, which would be to stay and hold this
9 petition in abeyance while Petitioner exhausts his new claims in the state courts.

10 While Kelly does not require the Court to find “good cause,” all motions filed in
11 federal court must be filed in good faith. See Fed. R. Civ. P. 11. Because Petitioner did
12 not set forth the proposed unexhausted claims in the initial motion, the Court could not
13 determine if this stay is being pursued in good faith. Furthermore, in establishing the
14 Kelly stay, the Ninth Circuit emphasized “clear appropriateness of a stay when **valid**
15 **claims** would otherwise be forfeited.” Kelly, 315 F.3d at 1070 (emphasis supplied).
16 Without a statement of the claims to be pursued and exhausted in state court, the Court
17 could not determine if the claims were valid, and thus, whether the stay would be
18 appropriate.

19 Petitioner’s response to the order to show cause resolved these issues. (ECF No.
20 16.) Plaintiff lists four claims that he seeks to pursue in state court. (Id.) While the first
21 claim appears to just be a justification for why his petition should not be rejected as
22 untimely (i.e., he received documents from the prosecutor more than three years after
23 seeking them), the remaining claims appear to be potentially “valid” assertions of
24 ineffective assistance of counsel. (Id.)

25 However, Petitioner is cautioned that “technical exhaustion” in the state courts
26 does not guarantee federal review at the third step of the Kelly procedure. See Mayle,
27 545 U.S. at 659 (newly exhausted claim that is untimely under AEDPA may be added
28 only if it “relates back” to the original exhausted claims); Duncan, 533 U.S. at 172-75

1 (AEDPA's statute of limitations is not tolled by the filing of federal habeas petition); King,
2 564 F.3d at 1140–41 (a newly exhausted claim may be added to a stayed federal
3 petition if timely under ADEPA); see also Murray v. Schriro, 745 F.3d 984, 1015 (9th Cir.
4 2014) (a federal court is without jurisdiction to consider federal claims found by state
5 courts to be procedurally barred).⁴

6 Therefore, while the Court will recommend granting petitioner's motion to stay and
7 abey this action, it does not at this time reach the question of whether any of the new
8 claims Petitioner intends to exhaust may later be presented in this federal habeas action
9 by way of amendment. The Court will address that question when, and if, Petitioner
10 seeks leave to present his newly exhausted claims to this Court in a further amended
11 federal petition pursuant to the third step of the procedure authorized by the Ninth Circuit
12 in Kelly.

13 For these reasons, the Court will recommend granting petitioner's motion to stay
14 this federal habeas action pending petitioner's exhaustion of state court remedies on his
15 unexhausted claims.

16 **III. Conclusion**

17 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

18 (1) Petitioner's motion for stay and abeyance (ECF No. 9) be GRANTED
19 pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003);

20 (2) Petitioner be directed to file in this court, every ninety (90) days
21 commencing with the filing date of the order adopting this recommendation, a status

22 _____
23 ⁴ As a general rule, any claim found by the state courts to be procedurally defaulted will not be considered
in this court:

24 The doctrine of procedural default provides that "a federal court will not review the merits
25 of claims, including constitutional claims, which a state court declined to hear because
26 the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1
27 (2012). This doctrine is grounded in federalism, because federal courts "will not review a
question of federal law decided by a state court if the decision of that court rests on a
state law ground that is independent of the federal question and adequate to support the
judgment." Coleman v. Thompson, 501 U.S. 722, 726-29 (1991).

28 Murray, 745 F.3d at 1015.

1 report that details Petitioner's progress in exhausting his unexhausted claims in the state
2 courts;

3 (3) Petitioner be directed to file a motion to lift the stay within 30 days of the
4 California Supreme Court issuing a final order resolving Petitioner's unexhausted claims;
5 and

6 (4) Petitioner be directed to file an amended habeas petition containing all
7 claims, including newly exhausted claims, with his motion to lift the stay.

8 The findings and recommendation are submitted to the assigned United States
9 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
10 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern
11 District of California. Within fourteen days after being served with a copy, the parties may
12 file written objections with the Court. Such a document should be captioned "Objections
13 to Magistrate Judge's Findings and Recommendation." Any reply to the objections shall
14 be served and filed fourteen days after service of the objections. The parties are advised
15 that failure to file objections within the specified time may result in the waiver of rights on
16 appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
17 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18
19 IT IS SO ORDERED.

20 Dated: March 29, 2018

21 /s/ Michael J. Seng
22 UNITED STATES MAGISTRATE JUDGE
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