

1 recommendations were issued by the assigned magistrate judge recommending that a stay and
2 abeyance be granted under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003) rather than under *Rhines*
3 *v. Weber*, 544 U.S. 269 (2005) because the federal petition filed with this court contained only
4 exhausted claims. (Doc. No. 17 at 3-5.) On June 25, 2018, a stay was granted pursuant to *Kelly*
5 *v. Small*, pending petitioner’s exhaustion of his unexhausted claims in state court. (Doc. No. 19.)
6 Petitioner was specifically advised at that time that the *Kelly* stay would allow him to amend his
7 presently-unexhausted claims into his pending federal petition after exhaustion in state court **only**
8 **if the he timely moved to amend his federal petition within the statute of limitations** set by
9 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). (Doc. No. 17 at 3–4)
10 (emphasis added). Petitioner was also ordered to file status reports with the court every ninety
11 days, describing the status of his exhaustion petition in the state court system. (Doc. No. 19 at 2.)
12 Finally, petitioner was ordered to file an amended federal petition containing all of his claims for
13 habeas relief, including any newly-exhausted claims, along with a motion to lift the stay within
14 thirty days of the California Supreme Court’s issuance of a final order on the exhaustion petition
15 he intended to file in state court. (*Id.*)

16 After status report filing deadlines were missed by petitioner in 2019, an order directing
17 him to file the required status reports was entered on October 30, 2019. (Doc. No. 23.) In
18 response, in a letter dated November 9, 2019 and received by the court November 15, 2019,
19 petitioner advised the court that he had exhausted his unexhausted claims in state court “as of
20 June 2019” and that he was “putting together” his amended federal petition. (Doc. No. 24.)
21 When nothing was received by the court from petitioner, an order requiring petitioner to show
22 cause why this federal habeas action should not be dismissed due to his failure to prosecute was
23 issued on February 25, 2020. (Doc. No. 26.) Thereafter, on March 30, 2020, petitioner finally
24 filed an amended federal petition containing the original four exhausted claims in which he
25 alleged trial court error and three later-exhausted claims in which he alleged he had received
26 ineffective assistance of counsel. (Doc. No. 30.) On April 17, 2020, the assigned magistrate
27 judge issued another order requiring petitioner to show cause as to why his three ineffective
28 assistance of counsel claims should not be dismissed as untimely and directing petitioner to

1 demonstrate the timeliness of those claims. (Doc. No. 31.) Petitioner submitted three responses
2 to the order to show cause providing reasons for his delay. (Doc. Nos. 32, 34, 36.) Petitioner
3 requested that in the event his ineffective assistance of counsel claims were found by the court to
4 be untimely, he wished to proceed with his petition bringing only the four timely claims of trial
5 court error. (Doc. Nos. 34 at 1, 36 at 2.)

6 The assigned magistrate judge concluded that none of the explanation offered by
7 petitioner rendered the subsequently exhausted and newly alleged ineffective assistance of
8 counsel claims timely under AEDPA.² (Doc. No. 37.) Accordingly, on August 3, 2020, findings
9 and recommendations were issued recommending that petitioner’s three ineffective assistance of
10 counsel claims be dismissed as untimely and recommending this action proceed only on
11 petitioner’s four timely claims of trial court error which were asserted in his original petition.
12 (Doc. No. 37). Those findings and recommendations were served on plaintiff by mail and
13 contained notice that any objections thereto were to be filed within thirty (30) days of service of
14 the findings and recommendations. (*Id.* at 5–6.) To date, no objections to the pending findings
15 and recommendations have been filed, and the time in which to do so has now passed.

16 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
17 court has conducted a *de novo* review of this case. Having carefully reviewed the entire file,

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26 ² The findings and recommendations contain references suggesting that petitioner’s new claims
27 be dismissed as “unexhausted” (Doc. No. 37 at 1, 3, 5) but the undersigned understands that the
28 magistrate judge’s intended description of the newly asserted ineffective assistance of counsel
claims was instead “untimely.”

1 including petitioner’s objections, the court finds the findings and recommendations to be
2 supported by the record and proper analysis.³

3 Having determined that petitioner is not entitled to habeas relief, the court now turns to
4 whether a certificate of appealability should issue. The federal rules governing habeas cases
5 brought by state prisoners require a district court to either issue or deny a certificate of
6 appealability when entering an order denying a habeas petition. *See* Rules Governing § 2254
7 Case, Rule 11(a). “[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement
8 to appeal a district court’s denial of his petition,” and an appeal is only allowed in certain
9 circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *see also* 28 U.S.C.
10 § 2253(c)(1)(A) (permitting habeas appeals from state prisoners only with a certificate of
11 appealability). A judge shall grant a certificate of appealability “only if the applicant has made a
12 substantial showing of the denial of a constitutional right” 28 U.S.C. § 2253(c)(2), and the
13 certificate must indicate which issues satisfy this standard, 28 U.S.C. § 2253(c)(3). Here,
14 petitioner has not made such a showing because he has not been able to demonstrate that any
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16 ³ The March 29, 2018 findings and recommendations recommending the granting of a stay under
17 *Kelly* touched on the distinction between, and the requirements for, stays issued under *Kelly* and
18 *Rhines*. (Doc. No. 17 at 3-6.) In retrospect, petitioner may have conceivably benefited from a
19 more detailed or direct description of the pros and cons between the two procedures and the
20 requirements for pursuing each. *See Thompson v. Baughman*, No. 2:17-cv-0996 KJM AC P,
21 2017 WL 4699832, at *2 (E.D. Cal. Oct. 19, 2017) (“Overall, a *Rhines* stay is much harder to get
22 but preserves the federal filing date of the previously unexhausted claims for purposes of the
23 statute of limitations. A *Kelly* stay is easier to get, but does not provide any protection against
24 newly exhausted claims becoming time-barred during the exhaustion process.”); *Ramirez v.*
25 *People of California*, No. 2:14-cv-1016 WBS DAD P, 2014 WL 6469123, at *3, n.4 (E.D. Cal.
26 Nov. 17, 2014) (E.D. Cal. 2014) (“A petitioner who proceeds under *Rhines* is better able to avoid
27 a statute of limitations problem. However, the requirements for granting a stay under *Rhines* are
28 more stringent than in *Kelly*.”) Perhaps if he had better understood the byzantine nature of
current federal habeas law as it has now been constructed by Congress and the courts, petitioner
might have resisted the granting of a *Kelly* stay, filed an amended mixed petition containing both
his exhausted and unexhausted claims and attempted to show that he was entitled to the *Rhines*
stay he originally requested so that his ineffective assistance of counsel claims would not become
time-barred while he attempted to exhaust them in state court. On the other hand, perhaps not.
The court notes that petitioner apparently exhausted his ineffective assistance claims in June of
2019, yet did not file his amended federal petition asserting those claims before this court until
March 30, 2020. That post-exhaustion delay may well have proved fatal to petitioner’s
ineffective assistance of counsel claims in any event.

1 entitlements of statutory or equitable tolling permit the filing of his claims on March 30, 2020.
2 As such, a certificate of appealability will not be issued.

3 Accordingly:

- 4 1. The findings and recommendations issued on August 3, 2020 (Doc. No. 37) are
5 adopted in full;
- 6 2. Petitioner's three newly presented claims based on the alleged ineffective
7 assistance of counsel are dismissed because they were not timely filed within the
8 statute of limitations afforded by AEDPA as required for amendment after the
9 granting of a *Kelly* stay;
- 10 3. Petitioner may proceed in this habeas action on his other claims as originally
11 alleged;
- 12 4. The court declines to issue a certificate of appealability; and
- 13 5. This action is referred back to the assigned magistrate judge for further
14 proceedings consistent with this order.

15 IT IS SO ORDERED.

16 Dated: April 14, 2021

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19 UNITED STATES DISTRICT JUDGE
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