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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LOUIS MAGEE, JR.,
Petitioner,
v.
OAK SMITH, Acting Warden,
Respondent.

No. 1:21-cv-01598-KES-HBK (HC)
ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DENYING
PETITIONER’S MOTION FOR STAY AND
ABEYANCE
(Docs. 28, 30)

Petitioner Louis Magee, Jr. is a state prisoner proceeding pro se with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Doc. 1. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 2, 2023, petitioner moved for stay and abeyance of his federal petition to pursue unexhausted state habeas remedies. Doc. 28. On July 25, 2023, the assigned magistrate judge issued findings and recommendations that recommended petitioner’s motion for stay and abeyance be denied. Doc. 30. The magistrate judge noted that petitioner had failed to identify any claim that he intended to exhaust in state court. *Id.* at 4. The findings and recommendations were served on petitioner and contained notice that any objections were to be filed within fourteen (14) days of service. *Id.*

Petitioner timely submitted objections and included what he asserts is “new evidence that was later discovered” that “would have exonerated Petitioner from attempted murder” of his

1 former girlfriend. Doc. 31. Petitioner relies on a police report stating that he was arrested at the
2 scene after trying to force his way into his former girlfriend’s apartment, and that petitioner was
3 found with a 12-inch long blade, a roll of duct tape, several 50-60 gallon trash bags, and a pair of
4 latex gloves. The report indicates that, at the time, petitioner was subject to a domestic violence
5 restraining order. Petitioner appears to argue that the report is exculpatory because it indicates
6 that his former girlfriend had already moved out of the apartment and was not present when
7 petitioner tried to break into it. Petitioner previously attached the report as an exhibit to his
8 federal habeas petition. Doc. 1-2 at 12–14. It is not clear how the report could be construed as
9 exculpatory or as inconsistent with the prosecution’s argument that petitioner took direct steps in
10 furtherance of an attempt to kill his former girlfriend.

11 The magistrate judge correctly found that petitioner’s motion does not identify a claim he
12 intends to exhaust in state court. *See* Doc. 30 at 3–4. In his objections, petitioner points to the
13 police report but does not identify an unexhausted claim to which this evidence should attach.
14 *See* Doc. 31 at 1.

15 Additionally, petitioner has failed to establish any basis for a stay. As the magistrate
16 judge recognized, there are two separate procedures a petitioner may use to move for a stay and
17 abeyance: the procedures set out in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), and the
18 procedures set out in *Rhines v. Weber*, 544 U.S. 269 (2009). In *Kelly*, the Ninth Circuit approved
19 a procedure whereby a district court may stay a fully exhausted habeas petition if the petitioner
20 wishes to present unexhausted claims to a state habeas court. *Jackson v. Roe*, 425 F.3d 654, 661
21 (9th Cir. 2005). The purpose of the *Kelly* procedure is to allow for a stay when “valid claims
22 would otherwise be forfeited” due to AEDPA’s one year statute of limitations, 28 U.S.C.
23 § 2244(d)(1). *Kelly*, 315 F.3d at 1070.

24 In *Rhines v. Weber*, the Supreme Court approved stay and abeyance of “mixed” habeas
25 petitions—those that contain both exhausted and unexhausted claims—to allow petitioners to
26 return to state court to present their unexhausted claims. 544 U.S. 269 (2009). However, the
27 Court cautioned that this procedure should be available only when there is “good cause” for
28 failure to exhaust, the claims are not “plainly meritless,” and the petitioner has not engaged in

1 “abusive litigation tactics or intentional delay.” *Id.* at 277–78.

2 The *Kelly* and *Rhines* procedures are distinct in that *Kelly* applies to fully exhausted
3 petitions, while *Rhines* applies to mixed petitions. *Jackson*, 425 F.3d at 661. However, both
4 *Kelly* and *Rhines* caution district courts to allow stay and abeyance only when the unexhausted
5 claim potentially has merit. *See Kelly*, 315 F.3d at 1070 (explaining that the purpose of the
6 procedure is to prevent “*valid claims*” from being forfeited); *Rhines*, 544 U.S. at 277–78 (“Even
7 if good cause existed, the district court would abuse its discretion if it granted a stay when the
8 unexhausted claims are plainly meritless.”). As the magistrate judge found, petitioner does not
9 indicate whether he is requesting a stay under *Rhines* or *Kelly*.

10 The court therefore also declines to exercise its discretion to grant a stay because
11 petitioner has failed to demonstrate that any claim stemming from the police report might be
12 meritorious. Defendant appears to argue that the report is exculpatory because his former
13 girlfriend had already moved out of the apartment, but the report indicates that petitioner was
14 arrested shortly after attempting to break into the location where he believed his former girlfriend
15 lived, and that petitioner was found in possession of a 12-inch blade and other inculpatory items.
16 *See Doc. 31, Ex. A.* This information also does not appear to be new evidence as it is reflected in
17 the state appellate court decision on petitioner’s direct appeal, which petitioner attached to his
18 federal petition. *See Doc. 1 (Ex. C)* at 41–42, 52 (“Defendant’s presence at what he believed was
19 the victim’s apartment, his repeated attempts to make contact with her and his possession of tools
20 to commit murder speak to more than a mere preparation to commit murder, and we reject his
21 contrary argument.”). Accordingly, staying this case would be futile. *See Bell v. Arnold*, No. CV
22 17-1969, 2017 WL 4174402 (C.D. Cal. 2017) (“Obviously, there is no reason for a court to
23 exercise its discretion to stay an action if the claim for which a stay is sought is not cognizable or
24 is plainly meritless, as such a stay would be a fruitless and time-wasting event.”). Petitioner’s
25 motion for a stay is therefore also denied on this ground.

26 In accordance with the provisions of 28 U.S.C. § 636(b)(1), the court has conducted a de
27 novo review of the case. Having carefully reviewed the file, including petitioner’s objections, the
28 court determines the findings and recommendations are supported by the record and proper

1 analysis.

2 Accordingly,

3 1. The findings and recommendations issued on July 25, 2023, Doc. 30, are

4 ADOPTED in full;

5 2. Petitioner's motion for stay and abeyance, Doc. 28, is DENIED.

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8 IT IS SO ORDERED.

9 Dated: July 2, 2024



UNITED STATES DISTRICT JUDGE

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