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

TEODORO SEVERIANO ALCARAZ,

Petitioner,

No. CIV S-05-1597 LKK EFB P

vs.

G.J. GIURBINO, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. This action proceeds on the August 11, 2005 petition, wherein petitioner raises four grounds for relief from his December 29, 2000 conviction in the San Joaquin County Superior Court.¹ Pet. at 2. On November 9, 2006, respondent filed an answer to the petition, and on December 15, 2006, petitioner filed a traverse. Dckt. Nos. 21, 23. Over two- and-a-half years later, petitioner, on August 20, 2009, filed the instant request that the court stay his petition while he returns to the state courts to exhaust five newly discovered claims. Because petitioner fails to show good cause, the court recommends that petitioner’s motion be

¹ Petitioner claims his constitutional rights were violated by: (1) admission of “unfair expert witness testimony;” (2) prosecutorial misconduct; (3) ineffective assistance of counsel; and (4) cumulative errors rising to the level of a due process violation. Pet. at 5-6.

1 denied.

2 A court may stay a petition and hold it in abeyance pursuant to either *Kelly v. Small*, 315
3 F.3d 1063 (9th Cir. 2003) or *Rhines v. Weber*, 544 U.S. 269 (2005). *King v. Ryan*, 564 F.3d
4 1133, 1135 (9th Cir. 2009). The procedure varies depending on whether the petition presents
5 fully exhausted claims, or a mix of exhausted and unexhausted claims. Under *Kelly*, the
6 petitioner amends his petition to delete any unexhausted claims, and the court then stays and
7 holds in abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity
8 to proceed to state court to exhaust the deleted claims. *Id.* (citing *Kelly*, 315 F.3d at 1070-71).
9 Later, the petitioner amends his petition and adds the newly-exhausted claims to the original
10 petition. *Id.* Under *Rhines*, a court may stay a mixed petition, i.e., one containing exhausted and
11 unexhausted claims, to allow a petitioner to present unexhausted claims to the state courts.
12 *Rhines*, 544 U.S. at 277. Under *Rhines*, ““stay-and-abeyance is only appropriate when the
13 district court determines there was good cause for the petitioner’s failure to exhaust his claims
14 first in state court.”” *Kings*, 564 F.3d at 1139 (quoting *Rhines*, 544 U.S. at 277-78).
15 Furthermore, it is inappropriate to issue a stay under *Rhines* “when the unexhausted claims are
16 ‘plainly meritless,’ or where the petitioner has engaged in ‘abusive litigation tactics or
17 intentional delay.’” *Id.*

18 Petitioner does not expressly indicate whether he requests a stay pursuant to *Kelly* or
19 *Rhines*. He does argue, however, that good cause exists to justify his failure to exhaust earlier
20 and he requests that the court hold his “amended petition” in abeyance. Pet’r Mot. to Stay
21 (“Mot.”) at 1, 4; *see also id.* at 10 (requesting that the court “grant his claims under the
22 Application For Protective Order to amend, and Stay and Abey his Four Newly Discovered
23 Claims.”). Since petitioner purports to show good cause, and requests that the court hold his
24 “amended petition”(containing both exhausted and unexhausted claims) in abeyance, it appears
25 that he seeks a stay pursuant to *Rhines*. *See King*, 564 F.3d at 1135 (unlike *Kelly*, *Rhines*
26 requires a showing of good cause and only applies to mixed petitions, not fully exhausted

1 petitions). Assuming the court granted petitioner leave to amend his petition to add his five
2 unexhausted claims, the instant petition would be mixed, and the *Rhines* stay and abeyance
3 procedure would apply. However, amendment would be futile for such a purpose because
4 petitioner fails to establish the good cause required by *Rhines*.²

5 Petitioner’s unexhausted claims consist of the following: (1) “the court abused its power
6 and discretion by imposing a draconian restitution fine of \$10,000;” (2) the court failed “to
7 instruct the jury that intoxication could negate [] specific intent;” (3) petitioner’s confession was
8 involuntary “because petitioner was under the influence of alcohol;” (4) the court erred by
9 “imposing a life sentence” and “violated his right to [a] jury trial;” and (5) ineffective assistance
10 of trial and appellate counsel for waiving claims one through four, listed above. Mot. at 3.
11 According to petitioner, “good cause” exists to stay his petition because from May 26, 2006
12 through October 14, 2007, he had problems accessing the law library due to prison lockdowns.
13 Mot. at 2. On October 15, 2007, petitioner was transferred to his current institution, where he
14 has been attending the law library diligently. *Id.* Petitioner asserts that he only discovered his
15 new claims through his legal research at his current institution and after “shar[ing] that
16 information with other inmates.” *Id.* at 4. Petitioner also points out that he only has a junior
17 high school education, that his first language is Spanish, and that he did not have the money or
18 resources to hire an attorney. *Id.* at 5, 6.

19 Petitioner has not shown good cause to justify a stay. Petitioner fails to explain why he
20 could not have discovered and exhausted these new claims over five years ago when he
21 presented the four claims raised in the instant petition to the state courts. The factual predicate
22 of these claims should have been known to petitioner at the time of trial and sentencing, over
23 eight years ago, and petitioner fails to specify why he needed library access in order to discover
24 them. *See* Pet. at 2. Moreover, the petition has now been fully briefed for over two-and-a-half

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26 ² Furthermore, as explained below, the unexhausted claims are barred by the statute of limitations.

1 years and a stay at this point would frustrate the objectives of encouraging finality and
2 streamlining federal habeas proceedings. *See Rhines*, 544 U.S. at 277. Aside from petitioner’s
3 ignorance of the law, there is simply no explanation for why petitioner failed to present these
4 claims earlier. Moreover, ignorance of the law does not establish good cause for failure to
5 exhaust. *See Mora v. McDonald*, 2009 U.S. Dist. LEXIS 62123, at *13 (C.D. Cal. June 23,
6 2009); *see also Barno v. Hernandez*, 2009 U.S. Dist. LEXIS 69841, at *6-7 (S.D. Cal. Apr. 17,
7 2009) (limited library access, and lack of legal knowledge and literacy do not establish good
8 cause under *Rhines*); *Pressly v. Haws*, 2009 U.S. Dist. LEXIS 23864, at *12 (S.D. Cal. Mar. 23,
9 2009) (“To grant Petitioner’s motion for stay and abeyance because he lacks knowledge of ‘legal
10 matters or the science of law’ would allow virtually any habeas petitioner to subvert the Supreme
11 Court’s holding in *Rhines* and its instruction that district courts should only stay petitions in
12 ‘limited circumstances.’”); *Hernandez v. Sullivan*, 397 F. Supp.2d 1205, 1207 (C.D. Cal. 2005)
13 (denying stay where petitioner could not show that his failure to exhaust his claims resulted from
14 “any external objective factor that [could not] fairly be attributed to him.”).

15 Petitioner appears to claim that his unexhausted claims are timely. *See Mot.* at 5-10
16 (discussing equitable tolling of the one-year statute of limitations and actual innocence). This
17 court previously determined that, with statutory and equitable tolling, the statute of limitations in
18 this action ended on September 29, 2005. *See Dckt. No. 18* at 5, 6. While no further grounds
19 exist for statutory tolling, petitioner suggests that he is entitled to equitable tolling from May 26,
20 2006 through July 2009. *Mot.* at 2, 5. Even assuming petitioner presented facts sufficient to
21 justify equitable tolling for this period, which he has not, it would make no difference here. His
22 equitable tolling argument applies to a period of time beginning almost seven months after the
23 statute of limitations ended. Once the limitations period ended, it could not be revived, and
24 petitioner’s equitable tolling arguments are therefore, inapplicable.³ *See Mot.* at 5-7. Finally,

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26 ³ Petitioner claims he “can make a substantial showing of factual innocence.” *Mot.* at 7-
10. To the extent petitioner intends to circumvent the statute of limitations bar by claiming he

1 petitioner has not shown that the unexhausted claims share a “common core of operative facts”
2 and therefore relate back to the claims in the pending petition.⁴ *See Mayle v. Felix*, 545 U.S.
3 644, 659 (2005). A new claim does not “relate back” to the filing of an exhausted petition
4 simply because it arises from “the same trial, conviction, or sentence.” *Id.* at 662-64.
5 Petitioner’s new claims are unexhausted and untimely, and petitioner has not shown good cause
6 to stay the petition.

7 Accordingly, it is hereby RECOMMENDED that petitioner’s August 20, 2009 motion to
8 stay be denied.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days after
11 being served with these findings and recommendations, any party may file written objections
12 with the court and serve a copy on all parties. Such a document should be captioned “Objections
13 to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the
14 specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158
15 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: December 8, 2009.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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22 meets the standard for the “actual innocence” gateway articulated by *Schlup v. Delo*, 513 U.S.
23 298 (1995), he fails to do so. As a threshold matter, neither the Supreme Court nor the Ninth
24 Circuit has decided whether there is an actual innocence exception to a violation of § 2244(d)’s
25 limitations period. *See Majoy v. Roe*, 296 F.3d 770, 775-76 (9th Cir. 2002). Even if there is,
26 petitioner’s conclusory argument in this regard falls far short of the standard for actual
innocence, as petitioner does not present any evidence showing he is innocent.

⁴ One of petitioner’s unexhausted claims is ineffective assistance of counsel, but it rests
on grounds completely unrelated to the ineffective assistance of counsel claim raised in the
pending petition.