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

RICKIE A. BIDDLE,

Petitioner,

No. 2: 12-cv-1119 JAM JFM

vs.

WILLIAM KNIPP,

Respondent.

FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner is a state prisoner proceeding *pro se* with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner pleaded guilty to one count of residential robbery, one count of residential burglary, three counts of assault with force likely to cause great bodily injury, two counts of criminal threats, two counts of assault with a semi-automatic firearm, one count of false imprisonment by violence, one count of receiving stolen property, one count of possession of a firearm by a felon, and one count of carrying a loaded firearm with the intent to commit a felony. Petitioner received a sentence of twenty-seven years and four months imprisonment. Presently before the court is petitioner’s motion to stay and abey his federal habeas petition. For the following reasons, the motion to stay and abey should be denied.

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1 II. FACTUAL BACKGROUND¹

2 On the evening of October 1, 2007, defendant and several cohorts
3 invaded a home to rob the occupants. Defendant wielded a
4 semiautomatic pistol, and pistol-whipped or kicked some victims,
5 and made threats. The perpetrators were soon captured, in
6 possession of property taken from the home. It appears the home
7 was targeted because its occupants were marijuana growers.
8 Video taken by a surveillance camera at the home that night shows
9 codefendant Jack Baldwin cutting down “fully bushed” marijuana
10 plants on the property.

11 (Resp’t’s Lodged Doc. 8 at p. 2-3.)

12 III. PROCEDURAL HISTORY

13 Petitioner appealed to the California Court of Appeal after he was convicted and
14 sentenced. (See Resp’t’s Lodged Doc. 5.) On November 23, 2010, the California Court of
15 Appeal affirmed the judgment in a written opinion. (See Resp’t’s Lodged Doc. 8.) Thereafter,
16 petitioner filed a petition for review in the California Supreme Court. (See Resp’t’s Lodged
17 Doc. 9.) The California Supreme Court summarily denied the petition for review on February 2,
18 2011. (See Resp’t’s Lodged Doc. 10.)

19 On April 20, 2011, petitioner filed a state habeas petition in the Shasta County
20 Superior Court. (See Resp’t’s Lodged Doc. 11.) On June 6, 2011, the Shasta County Superior
21 Court denied the state habeas petition in a written decision. (See Resp’t’s Lodged Doc. 12.)

22 Petitioner filed his federal habeas petition on April 20, 2012.¹ Petitioner raises
23 the following claims in his federal habeas petition:

24 I. The trial court abused its discretion when it ruled there had been
25 no change of circumstances under a local rule prohibiting plea
26 agreements after the jury trial readiness conference absent a
change of circumstances, thereby rendering [petitioner’s] pleas of
guilty involuntary and denying him his right to effective assistance

¹ The factual background is taken from the Court of Appeal fo the State of California,
Third Appellate District’s opinion on direct appeal dated November 23, 2010. (See Resp’t’s
Lodged Doc. 8.)

¹ Where applicable, the dates used for petitioner’s filings are determined pursuant to the
prisoner mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988).

1 of counsel and due process under the Sixth and Fourteenth
2 Amendments to the United States Constitution and Article I,
3 Section 15 of the California Constitution. Moreover, the trial court
4 further abused its discretion and denied [petitioner] those state and
5 federal constitutional rights when it denied [petitioner's]
6 subsequent motion to withdraw his guilty pleas in the face of clear
7 and convincing evidence of grounds to do so.

8
9 II. The case must be remanded to allow [petitioner] an opportunity
10 to withdraw his pleas because he was denied the benefit of his plea
11 bargain as well as federal and state due process of law.

12
13 III. By failing to object to the prosecutor's silence during
14 argument on sentence, trial counsel rendered [petitioner]
15 ineffective assistance of counsel in violation of his rights to
16 counsel under the Sixth and Fourteen Amendments to the United
17 States Constitution and Article I, Section 15 of the California
18 Constitution.

19
20 IV. The trial court committed prejudicial error when it cut
21 [petitioner] off in mid-sentence during a hearing held pursuant to
22 People v. Marsden, supra, thereby precluding [petitioner] from
23 fully articulating his reasons why he sought to discharge his
24 attorney and potentially denying him his right to effective
25 assistance of counsel under the Sixth and Fourteenth Amendments
26 to the United States Constitution and Article I, Section 15 of the
California Constitution.

15 (Dkt. No. 1.)

16 On June 20, 2012, petitioner filed another state habeas petition in the Shasta
17 County Superior Court. That petition raised four claims; specifically:

18 I. Imposition of the one year sentence for count 3 violated Penal
19 Code § 654, and liberty interest rights protected by Hicks v.
Oklahoma (1980) 447 U.S. 343.

20 II. The failure to stay the sentences on counts 6 and 9 violated
21 Penal Code § 654; Petitioner's liberty interest protected by the
22 Fourteenth Amendment Due Process Clause held by Hicks v.
Oklahoma (1980) 447 U.S. 343; and the Double Jeopardy Clause
of the Fifth Amendment to the United States Constitution.

23 III. Imposition of the upper term without a finding and stating a
24 reason for imposing the upper term violated Penal Code § 1170(b)
25 and petitioner's liberty interest protected by the decision in Hicks
v. Oklahoma (1980) 447 U.S. 343.

26 IV. Penal Code § 2933.1 entitles petitioner to an additional day of
presentence custody time.

1 (Resp't's Lodged Doc. 13.)²

2 On August 1, 2012, the Shasta County Superior Court denied the June 2012 state
3 habeas petition in a written decision. (See Resp't's Lodged Doc. 14.) On September 11, 2012,
4 petitioner filed a state habeas petition in the California Court of Appeal which raised the same
5 issues petitioner raised in his June 2012 state habeas petition. (See Resp't's Lodged Doc. 15.)
6 The California Court of Appeal denied the state habeas petition but denied without prejudice
7 petitioner's claim for an additional day of presentence custody time. (See Dkt. No. 16.)

8 As petitioner was proceeding with his second state habeas petition in the state
9 courts, he filed a motion to stay and abey his federal habeas petition in this court on June 20,
10 2012. Petitioner seeks a motion to stay so that he can exhaust the four claims he raised in his
11 June 20, 2012 state habeas petition. (See Dkt. No. 8.) Respondent answered the federal habeas
12 petition on October 22, 2012. (See Dkt. No. 15.) Thereafter, respondent was ordered to respond
13 to petitioner's motion to stay and abey. (See Dkt. No. 17.) Respondent filed a response in
14 opposition to petitioner's motion to stay and abey on November 29, 2012. (See Dkt. No. 20.)

15 IV. MOTION TO STAY

16 Petitioner requests a motion to stay his federal habeas petition "so that he can
17 exhaust his state habeas petition raising four federal claims that Petitioner did not discover until
18 June, 2012. (See Dkt. No. 8 at p. 1.) Petitioner cites to King v. Ryan, 564 F.3d 1133 (9th Cir.
19 2009) to support his motion to stay.

20 In King, 564 F.3d at 1135, the Ninth Circuit explained the procedure whereby a
21 petitioner seeks a stay pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002). "Pursuant to
22 the Kelly procedure, (1) a petitioner amends his petition to delete any unexhausted claims; (2)
23 the court stays and holds in abeyance the amended, fully exhausted petition, allowing the

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25 ² Additionally, petitioner requested that the state judge recuse himself from deciding
26 petitioner's second habeas petition in the Shasta County Superior Court because "it would be
difficult for a judge to remain neutral," as the petition included several sentencing error claims.
(See Resp't's Lodged Doc. 13.)

1 petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the
2 petitioner later amends his petition and re-attaches the newly-exhausted claims to the original
3 petition.” King, 564 F.3d at 1135 (citing Kelly, 315 F.3d at 1070-71). Kelly requires the
4 petition to delete unexhausted claims such that only exhausted claims are stayed. See King 564
5 F.3d at 1135 (outlining Kelly procedure). Thus, under Kelly, a petitioner must still amend his
6 deleted claims within the one-year statute of limitations set forth in the Anti-Terrorism and
7 Effective Death Penalty Act of 1996 (“AEDPA”). See id. at 1138-39; see also 28 U.S.C. §
8 2244(d)(1) (“A 1-year statute of limitation shall apply to an application for a writ of habeas
9 corpus by a person in custody pursuant to the judgment of a State court.”).

10 In step three of the Kelly procedure, a petitioner is only allowed to add his newly-
11 exhausted claims back into the federal petition if the claims either are independently timely
12 under AEDPA or “relate back” to the exhausted claims in the pending petition. See King, 564
13 F.3d at 1140-41; see also Berry v. Jacquez, Civ. No. 10-305, 2011 WL 4738336, at *3 (E.D. Cal.
14 Oct. 5, 2011) (“Thus in order to grant a stay and abeyance under Kelly, a court must determine
15 that a petitioner’s unexhausted claims is not barred by the statute of limitations and also raises a
16 valid and not otherwise ‘plainly meritless’ claim.”), report and recommendation adopted by,
17 2011 WL 6024454, (E.D. Cal. Dec. 2, 2011); Maxwell v. Kramer, Civ. No. 07-548, 2011 WL
18 3359029, at *2 (E.D. Cal. Aug. 3, 2011) (same); Jones v. Runnels, Civ. No. 04-950, 2008 WL
19 697700, at *1 (E.D. Cal. Mar. 14, 2008). “An amended habeas petition does not relate back (and
20 thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported
21 by facts that differ in both time and type from those the original pleading set forth.” Mayle v.
22 Felix, 545 U.S. 644, 650 (2005). A new claim “relates back” to an existing claim if the two
23 claims share a “common core of operative facts.” Id. at 659. A new claim does not “relate
24 back” to an exiting claim simply because it arises from “the same trial, conviction or sentence.”
25 Id. at 663-64.

26 AEDPA places a one-year statute of limitations on the filing of petitions for writ

1 of habeas following final judgment from a state conviction. See 28 U.S.C. § 2244(d). Petitioner
2 did not seek a writ of certiorari from the United States Supreme Court on direct appeal. Thus,
3 typically, his AEDPA statute of limitations would begin to run ninety days from the time the
4 California Supreme Court denied the petition for review on February 2, 2011. See Bowen v.
5 Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (for purposes of determining when judgment is final
6 under § 2244(d)(1), period of direct review includes “the ninety-day period within which [the
7 petitioner] could have filed a petition for writ of certiorari from the United States Supreme
8 Court”). However, during the ninety-day period in this case, petitioner filed a state habeas
9 petition in the Shasta County Superior Court. That state habeas petition was denied on June 6,
10 2011. Thus, petitioner’s AEDPA one-year statute of limitations began to run on June 7, 2011 as
11 it was statutorily tolled during the pendency of his April 20, 2011 state habeas petition. See 28
12 U.S.C. § 2244(d)(2) (the AEDPA statute of limitations is statutorily tolled during the time a
13 properly filed application for post-conviction relief is pending in state court).

14 As previously stated, petitioner filed his federal habeas petition on April 20, 2012
15 which was within the applicable AEDPA statute of limitations. However, the filing of this
16 federal habeas petition did not toll AEDPA’s statute of limitations which began to run on June 7,
17 2011. See Duncan v. Walker, 533 U.S. 167, 181 (2001) (holding that AEDPA’s statute of
18 limitations is not statutorily tolled during the pendency of a federal habeas petition). Thus,
19 petitioner’s four new claims raised in his motion to stay which was filed in this Court on June
20 20, 2012 (or beyond AEDPA’s one-year statute of limitations) must either “relate back” to the
21 claims raised in the April 20, 2012 federal habeas petition or must be independently timely under
22 AEDPA for a Kelly/King stay to be warranted.

23 The four claims raised in the motion to stay do not relate back to the original
24 federal habeas petition. As described supra, those four claims assert that the trial judge erred in
25 arriving at his sentence for petitioner. Comparatively, petitioner’s claims raised in the original
26 habeas petition are separated in “time and type” from these four claims. See Mayle, 545 U.S. at

1 657. Claims I and II of the original federal habeas petition relate to petitioner’s plea (or lack
2 thereof), not to his sentencing. Furthermore, Claim III asserts that trial counsel was ineffective
3 in failing to object to the prosecutor’s silence with respect to a purported recommendation as to
4 sentencing. Finally, Claim IV relates to the trial court’s ruling at petitioner’s Marsden hearing.
5 These four claims are all of a different time and type from petitioner’s claims alleging that the
6 trial judge erred in arriving at his sentence for petitioner. See, e.g., Hebner v. McGrath, 543 F.3d
7 1133, 1138 (9th Cir. 2008) (new proposed claim of improper admission of testimony did not
8 relate back to initial petition which raised jury instruction claim); Hughes v. Walker, Civ. No.
9 10-3024, 2012 WL 346449, at *6 (E.D. Cal. Feb. 1, 2012) (finding that proposed new claim
10 which focused on what occurred at the preliminary hearing is separated by time and type of
11 claim alleging Confrontation Clause claim occurring at trial). Accordingly, the four proposed
12 claims in the motion to stay do not “relate back” to the original habeas petition.

13 Petitioner also argues that he only discovered the claims raised in his motion to
14 stay after a prisoner reviewed his transcripts and discovered “four federal errors” under the Due
15 Process Clause. According to petitioner, he had assumed that all of his due process claims had
16 been raised by his appellate counsel. (See Dkt. No. 8 at p. 1-2.) Section 2244(d)(1)(D) states
17 AEDPA’s statute of limitations begins to run on a claim on “the date on which the factual
18 predicate of the claim or claims presented could have been discovered through the exercise of
19 due diligence.” Thus, under Section 2244(d)(1)(D), AEDPA’s statute of limitations commences
20 when petitioner knows or through the exercise of due diligence should discover the factual
21 predicate of his claims, not when petitioner learns the legal significance of those facts. See Redd
22 v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003); Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th
23 Cir. 2001); see also Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004) (“Section 2244(d)(1)(D)
24 provides a petitioner with a later accrual date than Section 2244(d)(1)(A) only ‘if vital facts
25 could not have been known.’”) (quoting Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)).

26 In this case, Section 2244(d)(1)(D) does not provide for a later accrual date for

1 the claims raised in the motion to stay to make them timely. As described supra, those claims
2 relate to alleged errors by the trial judge with respect to petitioner's sentence. Petitioner was
3 present at sentencing in 2009. (See Clerk's Tr. at p. 511-16.) Thus, through the exercise of due
4 diligence, he should have discovered the factual predicate of his sentencing claims at or around
5 that time, not in 2012 when a prisoner reviewed petitioner's transcripts.

6 Therefore, as the claims petitioner raises in his motion to stay would be barred by
7 AEDPA's statute of limitations, the motion for stay should be denied.

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1 V. CONCLUSION

2 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion to stay
3 (Dkt. No. 8.) be denied.

4 These findings and recommendations are submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
6 days after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections petitioner
9 may address whether a certificate of appealability should issue in the event he files an appeal of
10 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the
11 district court must issue or deny a certificate of appealability when it enters a final order adverse
12 to the applicant). Any reply to the objections shall be served and filed within fourteen days after
13 service of the objections. The parties are advised that failure to file objections within the
14 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
15 F.2d 1153 (9th Cir. 1991).

16 DATED: December 11, 2012.

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19 UNITED STATES MAGISTRATE JUDGE
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