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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN SHAW VOAGE,  
Petitioner,  
v.  
DANIEL PARAMO, Warden,  
Respondent.

No. 2:13-cv-1342 JAM AC P

ORDER

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a habeas corpus petition pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner’s amended motion for a stay and abeyance of his amended habeas petition as well as petitioner’s motion to supplement his amended petition. ECF Nos. 33, 40. The motions have been fully briefed. ECF Nos. 38, 39, 41, 43.

First Amended Petition

Petitioner was convicted in Yolo County Superior Court in June of 2011 of receiving stolen property, and sentenced in August of 2011 to a state prison term of thirty years to life under California’s three-strikes law. Amended Petition filed on April 21, 2014, ECF No. 34 at 1. Petitioner challenges his conviction on the following grounds: (1) ineffective assistance of appellate counsel for failing to appeal claims of constitutional merit; (2) judicial misconduct during sentencing proceedings which led to a fundamentally unfair life sentence; (3) restitution

1 ordered as part of petitioner's sentence excessive; (4) trial court error by admission of petitioner's  
2 six prior felony convictions as impeachment evidence at trial; (5) trial court error by denying  
3 motion for mistrial based on information that was discovered late due prosecutor's failure to  
4 disclose information favorable to the defense; (6) the prosecutor committed misconduct during  
5 argument to jury; (7) trial court erred by failing to strike priors; and (8) petitioner's three-strikes  
6 sentence violates the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at  
7 12-43.

8 At the time of filing the amended petition, petitioner asserted that Claims 1 through 3  
9 were unexhausted and pending in state court while Claims 4 through 8 had been exhausted. ECF  
10 No. 34 at 7.

#### 11 The Amended Motion to Stay Is Now Moot

12 In his amended motion to stay, petitioner sought a stay of his mixed amended petition  
13 pursuant to Rhines v. Weber, 544 U.S. 269 (2005). ECF No. 33. However, this motion has now  
14 been rendered moot. On November 20, 2014, petitioner brought his motion to supplement the  
15 amended petition and asked that his amended motion to stay be vacated based on his having  
16 exhausted all claims as of October 29, 2014. ECF No. 40 at 1, 6. Respondent does not oppose  
17 withdrawal of the motion. ECF No. 41 at 2-3. The motion to stay will be vacated as moot.

#### 18 Motion to Supplement Amended Petition

19 Petitioner asks that Claim 3, the restitution claim, be "delete[d]" from his amended  
20 petition. ECF No. 40 at 7, 10. This request is expressly unopposed by respondent.<sup>1</sup> ECF No. 41  
21 at 2-3. Petitioner makes clear that he abandoned Claim 3 by having elected not to present it to the  
22 California Supreme Court. ECF No. 40 at 5, 7. Petitioner's request to voluntarily dismiss his  
23 unexhausted Claim 3 is granted. Petitioner therefore seeks to proceed upon Claims 1-2 and 4-8  
24 and states that he moves to supplement claims 1 and 2 of his amended petition pursuant to Rule  
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26 <sup>1</sup> Respondent is correct that claim 3 is without merit. Bailey v. Hill, 599 F.3d 976, 981, 983 (9th  
27 Cir. 2010) ("section 2254(a) does not confer jurisdiction over a state prisoner's in-custody  
28 challenge to a restitution order imposed as part of a criminal sentence."); see also, United States  
v. Thiele, 314 F.3d 399, 402 (9th Cir. 2002) ("[c]laims seeking release from custody can be  
brought under § 2255; claims seeking other relief cannot.").

1 15(d) of the Federal Rules of Civil Procedure. ECF No. 40 at 1-10.

2 Respondent opposes petitioner's motion to supplement Claims 1 and 2, contending that  
3 petitioner's request does not fall within the parameters of supplemental pleadings.<sup>2</sup> ECF No. 41.

4 Petitioner does not specify the material with which he seeks to supplement his petition.  
5 However, he attaches a copy of the petition he submitted to the California Supreme Court, setting  
6 forth his claims 1 and 2, as well as a copy of the postcard denial dated October 29, 2014 that he  
7 received from that court.<sup>3</sup> Supplementation under Rule 15 is not necessary in order for this court  
8 to consider the state court record related to exhaustion. Accordingly, the court construes the  
9 motion as a request to proceed on newly exhausted Claims 1 and 2, as well as on his previously  
10 exhausted Claims 4 through 8, set forth in the amended petition.

11 As so construed, the motion will be granted. A briefing schedule is set forth below.

12 Accordingly, IT IS ORDERED that:

- 13 1. Petitioner's amended motion to stay, ECF No. 33, is VACATED as moot;
- 14 2. Petitioner's unopposed request to withdraw Claim 3, regarding restitution, is  
15 GRANTED and Claim 3 is hereby stricken from the amended petition, ECF No. 34;
- 16 3. Petitioner's motion to supplement the amended petition, construed as a request to  
17 proceed on Claims 1-2 and 4-8, is GRANTED;
- 18 4. Respondent is directed to file a response to petitioner's amended habeas petition within  
19 sixty days from the date of this order. See Rule 4, 28 U.S.C. foll. § 2254. An answer shall be  
20 accompanied by all transcripts and other documents relevant to the issues presented in the  
21 petition. See Rule 5, 28 U.S.C. foll. § 2254;

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23 <sup>2</sup> Under Rule 15(d), a party may be permitted "to serve a supplemental pleading setting out any  
24 transaction, occurrence, or event that happened after the date of the pleading to be supplemented."


25 <sup>3</sup> The order denying relief cites no procedural bar. "When a federal claim has been presented to a  
26 state court and the state court has denied relief, it may be presumed that the state court  
27 adjudicated the claim on the merits in the absence of any indication or state-law procedural  
28 principles to the contrary." Harrington v. Richter, 131 S. Ct. 770, 784-85 (2011). Exhaustion is  
satisfied if the highest state court considers the merits of the claim. Cooper v. Neven, 641 F.3d  
322, 331 (9th Cir. 2011); Greene v. Lambert, 288 F.3d 1081, 1087-88 (9th Cir. 2002) ("a bare  
postcard denial from the California Supreme Court" is construed "as a decision on the merits, for  
purposes of the exhaustion requirement, unless that court expressly relied on a procedural bar.").

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5. If the response to the amended habeas petition is an answer, petitioner's reply, if any, shall be filed and served within thirty days after service of the answer;

6. If the response to the habeas petition is a motion, petitioner's opposition or statement of non-opposition to the motion shall be filed and served within thirty days after service of the motion, and respondent's reply, if any, shall be filed and served within fourteen days thereafter.

DATED: December 22, 2014

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE