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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOWARD MARTIN HARMLESS,
Petitioner,
v.
J. LAZZARAGA, Warden,
Respondent.

No. 2:14-cv-0223 DAD P

ORDER

Petitioner is a state prisoner proceeding pro se with an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has consented to magistrate judge jurisdiction in this action all purposes, pursuant to 28 U.S.C. § 636(c), and Local Rule 305(a). (See ECF No. 4.) Pending before the court are petitioner’s motions to proceed in forma pauperis and for a stay and abeyance of these proceedings pending exhaustion of his unexhausted claims in state court. For the reasons that follow, the court grants petitioner’s motions.

I. Background

On January 23, 2014, petitioner filed his original federal petition for writ of habeas corpus, challenging his 2010 judgment of conviction, entered in the El Dorado County Superior Court, for furnishing marijuana to minors and lewd acts on a child, with sentencing enhancements based on prior convictions for child molestation. (ECF No. 1.)

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1 On January 28, 2014, this court directed petitioner to file an amended petition for writ of
2 habeas corpus that included his signature, as required by Rule 2 of the Rules Governing Section
3 2254 Cases, and accorded petitioner the opportunity to submit an application to proceed in forma
4 pauperis or the appropriate filing fee.

5 On February 10, 2014, petitioner filed a motion to proceed in forma pauperis (ECF No. 7),
6 the operative amended petition for writ of habeas corpus (ECF No. 6), and a motion to “stay and
7 abey” his amended petition (ECF No. 5).

8 II. Application to Proceed In Forma Pauperis

9 Examination of the in forma pauperis application demonstrates that petitioner is unable to
10 afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be
11 granted. See 28 U.S.C. § 1915(a).

12 III. Amended Petition for Writ of Habeas Corpus¹

13 The amended federal habeas petition before the court contains only one claim, described
14 by petitioner as follows: “The trial court abused its discretion and prejudiced defendant’s defense
15 by admitting evidence of prior sex offenses as evidence for propensity evidence under Evidence
16 Code § 1108.” (ECF No. 6 at 3.) Petitioner alleges that this claim was fully exhausted in state
17 court on direct review. See 28 U.S.C. § 2254(b)(1)(A) (exhaustion of state court remedies is a
18 prerequisite to seeking federal habeas relief). Petitioner also states that he did not pursue
19 collateral review on any of the claims set forth in his amended federal petition by way of state
20 habeas petitions.²

21 It would appear that petitioner timely commenced this federal habeas action within the
22 one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act

23 ¹ The amended petition for writ of habeas corpus is identical to the original petition, except that
24 the amended petition includes petitioner’s signature.

25 ² AEDPA’s limitation period is statutorily tolled during the pendency of “a properly filed
26 application for State post-conviction or other collateral review with respect to the pertinent
27 judgment or claim” 28 U.S.C. § 2244(d)(2). In addition, the limitation period may be
28 equitably tolled if a petitioner can establish that he diligently pursued his rights but some
extraordinary circumstance stood in his way. Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir.
2006).

1 of 1996 (AEDPA). See 28 U.S.C. § 2244(d). Specifically, this action was filed on January 23,
2 2014, within the one-year period after petitioner’s judgment of conviction and sentence became
3 final on April 23, 2013.³ See 28 U.S.C. § 2244(d)(1)(A) (one-year limitations period commences
4 with “the date on which the judgment became final by the conclusion of direct review or the
5 expiration of the time for seeking such review”).

6 IV. Motion to Stay and Abey

7 A. Petitioner’s Motion

8 As noted, petitioner has filed a motion seeking to have his fully exhausted federal
9 amended habeas petition stayed and these proceedings held in abeyance while he exhausts
10 “approximately” four additional claims in state court. Citing the decision in Kelly v. Small, 315
11 F.3d 1063 (9th Cir. 2003), petitioner states that his goal is to further amend his federal petition to
12 include these additional claims once they are exhausted in state court. However, petitioner also
13 reports that he has not yet obtained his case file from his state appellate counsel, and may need to
14 “seek judicial intervention from the lower courts to compel counsel to send me my trial record.”
15 (ECF No. 5 at 8.) In addition, petitioner states that, once he obtains his case file, there “maybe
16 (sic) more issues” for him to exhaust. (Id. at 3.)

17 Before this court petitioner identifies only two of the four putative claims, a challenge to
18 the restitution imposed as part of his sentence and a claim challenging the sufficiency of the
19 evidence introduced at his trial, which he intends to exhaust. Petitioner asserts that both of these
20 claims were addressed and rejected by the California Court of Appeal, but that neither was
21 presented in the petition for review submitted to the California Supreme Court on his behalf.

22
23 ³ The California Court of Appeal affirmed petitioner’s judgment of conviction and sentence on
24 November 16, 2012. See People v. Harmless, Case No. C066882, 2012 WL 5704937 (Cal. App.
25 3d Dist. Nov. 16, 2012). Petitioner petitioned the California Supreme Court for review on
26 December 19, 2012, and that petitioner was denied on January 23, 2013. See People v. Harmless,
27 Case No. S207430 (California Supreme Court Docket). Because petitioner did not file a petition
28 for writ of certiorari in the United States Supreme Court, the judgment became final upon
expiration of the ninety-day period for seeking a writ of certiorari. See Supreme Court Rule 13;
Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Therefore, petitioner’s judgment of
conviction and sentence became final on April 23, 2013, ninety days after the California Supreme
Court denied review on January 23, 2013.

1 Review of the California Court of Appeal decision⁴ supports petitioner’s representation that these
2 claims were considered and rejected by that court, due in part (as petitioner asserts) to the alleged
3 failure of his appellate counsel to cite authority in support of them. See People v. Harmless, Case
4 No. C066882, 2012 WL 5704937 (Cal. App. 3d Dist. Nov. 16, 2012). Thus, for example,
5 petitioner’s restitution claim, in which he challenged the trial court’s restitution award to “Doe”
6 for noneconomic damages, was rejected by the state appellate court in part because “defendant
7 cites no authority in support of his argument.” Id. at *5. Similarly, petitioner’s sufficiency of
8 evidence claim was rejected by the state appellate court in part because “defendant . . . provides
9 no citations to authority or argument.” Id. at *4.

10 B. Stay and Abeyance Procedures

11 There are two procedures available to federal habeas petitioners who wish to proceed with
12 both exhausted and unexhausted claims. See King v. Ryan, 564 F.3d 1133 (9th Cir. 2009).
13 Petitioner requests application of the “Kelly procedure,” Kelly v. Small, 315 F.3d 1063 (9th Cir.
14 2003).⁵ The Ninth Circuit Court of Appeals has described the “Kelly procedure” as a three-step
15 process:

- 16 (1) a petitioner amends his petition to delete any unexhausted
17 claims; (2) the court stays and holds in abeyance the amended, fully
18 exhausted petition, allowing the petitioner the opportunity to
19 proceed to state court to exhaust the deleted claims; and (3) the
petitioner later amends his petition and re-attaches the newly-
exhausted claims to the original petition.

20 ⁴ This court may take judicial notice of its own records and the records of other courts. See
21 United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004); United States v. Wilson, 631
22 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid. 201 (court may take judicial notice of facts
23 that are capable of accurate determination by sources whose accuracy cannot reasonably be
questioned).

24 ⁵ The alternate procedure was set forth by the Supreme Court in Rhines v. Weber, 544 U.S. 269,
277 (2005). Under the Rhines procedure, a district court may stay a petitioner’s “mixed petition”
25 (containing both exhausted and unexhausted claims), while petitioner returns to state court to
26 exhaust his unexhausted claims. Id. at 277-78; see also King, 564 F.3d at 1140. A stay under
Rhines is appropriate only when petitioner has demonstrated good cause for failing to previously
27 exhaust his claims in state court, and is not available if the unexhausted claims are “plainly
28 meritless,” or petitioner has engaged in “abusive litigation tactics or intentional delay.” Rhines,
544 U.S. at 277-78. “[B]oth Kelly and Rhines are directed at solving the same problem --
namely, the interplay between AEDPA’s one-year statute of limitations and the total exhaustion
requirement first articulated in Rose v. Lundy, 455 U.S. 509 (1982).” King, 564 F.3d at 1136.

1 King, 564 F.3d at 1135 (citing Kelly, 315 F.3d at 1070-71). The instant petition, asserting only
2 an exhausted claim, satisfies the first step under Kelly.

3 Significantly, “the Kelly procedure . . . is not premised upon a showing of good cause.”
4 King, 564 F.3d at 1140. However, “[a] petitioner seeking to use the Kelly procedure will be able
5 to amend his unexhausted claims back into his federal petition once he has exhausted them only if
6 those claims are determined to be timely” under AEDPA’s statute of limitations.⁶ Id. at 1140-41.
7 Thus, the Kelly procedure, in contrast to the Rhines procedure (see n.5, above), does not protect a
8 petitioner’s unexhausted claims from expiring during a stay and becoming time-barred in federal
9 court. King, 564 F.3d at 1140-41; see also Duncan v. Walker, 533 U.S. 167, 172-75 (2001)
10 (unlike the filing of a state habeas petition, the filing of a federal habeas petition does not toll
11 AEDPA’s statute of limitations). “[T]he Kelly procedure, unlike the Rhines procedure, does
12 nothing to protect a petitioner’s unexhausted claims from untimeliness in the interim.” King, 564
13 F.3d at 1141.

14 If a newly exhausted claim is time-barred, it may be added in an amended petition only if
15 it “relates back” to petitioner’s original exhausted claims. However, a new claim does not “relate
16 back” to the original petition simply because it arises from “the same trial, conviction, or
17 sentence.” Mayle v. Felix, 545 U.S. 644, 662-64 (2005). Rather, the new claim must be of the
18 same “time and type” as the original exhausted claims, and share a “common core of operative
19 facts” with those claims. Id. at 659.

20 C. Discussion

21 The only claim alleged in the amended federal petition was exhausted in the state courts,
22 thus satisfying the first step of the Kelly procedure. As previously noted, a finding of good cause
23 is not required for the court to proceed to the second step, by granting petitioner’s motion to stay

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25 ⁶ AEDPA’s limitation period is calculated from the “latest” of four commencement dates. See 28
26 U.S.C. § 2244(d)(1)(A) (date on which the judgment became final); § 2244(d)(1) (B) (date on
27 which the illegal state-action impediment to filing was removed); § 2244(d)(1)(C) (date on which
28 the asserted constitutional right was initially recognized by the U.S. Supreme Court and made
retroactive to cases on collateral review); and § 2244(d)(1)(D) (date on which the factual
predicate of the claim could have been discovered through due diligence).

1 this action and hold his amended petition in abeyance while petitioner exhausts his remaining
2 claims in the state courts.

3 However, petitioner is cautioned that “technical exhaustion” in the state courts does not
4 guarantee federal review at the third step of the Kelly procedure. See Mayle, 545 U.S. at 659
5 (newly exhausted claim that is untimely under AEDPA may be added only if it “relates back” to
6 the original exhausted claims); Duncan, 533 U.S. at 172-75 (AEDPA’s statute of limitations is not
7 tolled by the filing of federal habeas petition); King, 564 F.3d at 1140-41 (a newly exhausted
8 claim may be added to a stayed federal petition if timely under ADEPA); see also Murray v.
9 Schriro, 745 F.3d 984, 1015 (9th Cir. 2014) (a federal court is without jurisdiction to consider
10 federal claims found by state courts to be procedurally barred).⁷

11 Therefore, while the court will grant petitioner’s motion to “stay and abey” this action, it
12 does not at that time reach the question of whether any of the new claims petitioner intends to
13 exhaust may later be presented in this federal habeas action by way of amendment. The court
14 will address that question when, and if, petitioner seeks leave to present his newly exhausted
15 claims to this court in a further amended federal petition pursuant to the third step of the
16 procedure authorized by the Ninth Circuit in Kelly.

17 For these reasons, the court will grant petitioner’s motion to “stay and abey” this federal
18 habeas action pending petitioner’s exhaustion of state court remedies on his unexhausted claims.

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21 ⁷ As a general rule, any claim found by the state courts to be procedurally defaulted will not be
22 considered in this court:

23 The doctrine of procedural default provides that “a federal court
24 will not review the merits of claims, including constitutional
25 claims, which a state court declined to hear because the prisoner
26 failed to abide by a state procedural rule.” Martinez v. Ryan,
27 __U.S.__, __, 132 S. Ct. 1309, 1316 (2012). This doctrine is
grounded in federalism, because federal courts “will not review a
question of federal law decided by a state court if the decision of
that court rests on a state law ground that is independent of the
federal question and adequate to support the judgment.” Coleman v.
Thompson, 501 U.S. 722, 726-29 (1991).

28 Murray, 745 F.3d at 1015.

1 V. Conclusion

2 For the foregoing reasons IT IS HEREBY ORDERED that:

3 1. Petitioner's motion to proceed in forma pauperis (ECF No. 7), is granted.

4 2. Petitioner's motion to "stay and abey" this action (ECF No. 5), pursuant to Kelly v.
5 Small, 315 F.3d 1063 (9th Cir. 2003), is granted.

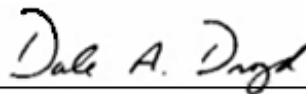
6 3. This action is stayed pending exhaustion of state court remedies on petitioner's
7 unexhausted claims.

8 4. Petitioner is directed to file in this court, every ninety (90) days commencing with the
9 filing date of this order, a status report that details petitioner's progress in exhausting his
10 unexhausted claims in the state courts.

11 5. Petitioner is directed to file in this court, within thirty (30) days after the California
12 Supreme Court issues a final order resolving petitioner's unexhausted claims, a motion
13 requesting that the instant stay be lifted, and that leave be granted to file a Second Amended
14 Petition for Writ Of Habeas Corpus pursuant to 28 U.S.C. § 2254; petitioner shall include his
15 proposed Second Amended Petition.

16 6. The Clerk of Court is directed to administratively close this case until further order of
17 this court.

18 Dated: June 12, 2014

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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