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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL B. PRYOR,
Petitioner,
v.
M. SPEARMAN,
Respondent.

No. 2:14-cv-01521 DB

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for marijuana cultivation, possession for sale, and transportation. (ECF No. 1.) Petitioner is presently proceeding on his second amended petition. (ECF No. 60.) Petitioner filed a motion to stay this action while exhausting three of his claims in state court. (ECF No. 61.) Respondent moved to dismiss this action. (ECF No. 63.) Respondent’s motion to dismiss doubles as an opposition to the motion to stay. (Id.) Petitioner opposes the motion to dismiss. (ECF No. 67.) Respondent filed a reply memorandum in support of the dismissal motion. (ECF No. 69.) The court held oral argument on the motions and took the matters under submission. (ECF No. 70.) The parties have consented to full magistrate judge jurisdiction. (ECF Nos. 7; 17.)

For the reasons set forth below, petitioner’s motion for a stay is granted and respondent’s motion to dismiss is granted in part and denied in part.

///

1 **I. Background**

2 Petitioner was convicted of marijuana cultivation, possession for sale, and transportation,
3 based on charges that he cultivated marijuana in several locations. (ECF No. 60 at 2.) He was
4 sentenced to a state prison term of nine years, including four years and eight months for on-bail
5 enhancements.¹ (Id.) Three on-bail enhancements were later stricken by the state court of appeal.
6 (Id.) Petitioner has now completed his prison term but remains on parole. (Id.) He was in state
7 prison custody at the time the initial federal habeas petition was filed.

8 Immediately following his conviction and sentencing, petitioner filed a timely appeal with
9 the Third District of the California Court of Appeals. (Id.) On August 28, 2012, the state court of
10 appeal affirmed the conviction, but ordered multiple on-bail enhancements stricken. (Id. at 3.) A
11 timely Petition for Review was filed with the California Supreme Court. (Id.) The Petition for
12 Review was denied without comment on October 31, 2012. (Id.) The time for seeking certiorari
13 review lapsed on January 30, 2013.

14 Petitioner filed his first state habeas action in Tehama County Superior Court on
15 December 20, 2013. (Id.) In that petition, it was argued that (1) petitioner received ineffective
16 assistance of counsel for failure to obtain aerial photographs which were taken by a police agent
17 prior to the issuance of the search warrant for petitioner's properties; (2) a defense witness was
18 arrested during trial and threatened with prosecution as a means of making her unavailable as a
19 defense witness; and (3) the prosecution violated its responsibility to disclose exonerating
20 evidence. (Id. at 3-4.) That petition was denied on December 20, 2013. (Id. at 4.) An amended
21 petition was filed and denied by order on February 5, 2014. (Id. at 4.)

22 On February 7, 2014, the same claims were raised in a habeas corpus petition in the Third
23 District of the California Court of Appeal. (Id.) That petition was denied on February 13, 2014.
24 (Id.) A habeas petition raising the same or similar claims was filed in the California Supreme
25

26 ¹ Cal. Penal Code 12022.1 defines "on-bail enhancement" as a situation where "any person
27 arrested for a secondary offense which was alleged to have been committed while that person was
28 released from custody on a primary offense shall be subject to a penalty enchantment of an
additional two years in state prison which shall be served consecutive to any other term imposed
by the court."

1 Court on April 10, 2014, and that petition was denied on May 14, 2014. (Id.)

2 **A. Initial Federal Petition**

3 A timely habeas corpus petition was filed in this court on a pro se basis on June 26, 2014.
4 (ECF No. 1.) This petition was identical to the petition filed in the California Supreme Court. It
5 raised three issues: (1) ineffective assistance of state trial counsel for failure to interview and
6 subpoena witnesses, failure to lay a proper foundation for the medical marijuana defense, and
7 failure to obtain aerial photographs whose existence became known during the jury trial; (2)
8 prosecution misconduct for harassment of a defense witness, causing her to become unavailable
9 to testify; and (3) prosecution failure to disclose exonerating evidence including the lease/sale
10 agreement for the property, the Proposition 215 authorizations for the cultivation, evidence that
11 the property was in foreclosure, and aerial photographs obtained by a civilian police agent.
12 (Id.)

13 This petition was initially dismissed as untimely on July 28, 2014; however, petitioner,
14 through counsel, filed a motion for reconsideration, which was granted on August 11, 2015. The
15 court found that the initial filing could be liberally construed as petitioner asking the court to
16 accept the state petition as his federal petition, subject to later amendment. (ECF No. 38.) The
17 clerk of the court was directed to revise docket entry number 10 as “Amended Petition for writ of
18 habeas corpus.” (Id.)

19 On October 14, 2015, counsel was appointed to represent petitioner in this court. The
20 matter was thereafter continued for discovery and to prepare a second amended petition. (ECF
21 No. 43.)

22 **B. Second Amended Petition**

23 On September 9, 2016, through counsel, petitioner filed his second amended habeas
24 petition. (ECF No. 60.) Generally, petitioner claims that he was denied his federal constitutional
25 rights to due process and effective assistance of counsel. (Id. at 6.) The petition raises the
26 following five claims:

27 (1) Petitioner was denied Due Process by the state court decision denying a hearing
28 and rendering him unable to challenge the July 30, 2009, search of his properties;

1 (2) Petitioner was denied Due Process by the lack of a record of events in the
2 courtroom while the judge and the attorneys were in chambers;

3 (3) Petitioner was denied Due Process by the lack of a record of events in chambers
4 while the judge and the attorneys discussed a defense objection;

5 (4) Petitioner was denied effective assistance of counsel guaranteed by the Sixth
6 Amendment, due to (a) failure to preserve a record of events in the courtroom during the in
7 chambers colloquy; (b) failure to preserve a record of oral proceedings in chambers; (c) failure to
8 enter the search warrant into the record; and (d) failure to introduce documentation of the county
9 policies enforcing the Medical Marijuana Program;

10 (5) Petitioner was denied Due Process by threats to prosecute a defense witness,
11 Tanya Hale. (Id. at 6-7.)

12 **C. Motion to Dismiss**

13 Respondent moves to dismiss the first four claims of the second amended petition on
14 several grounds. (ECF No. 63.) Respondent argues that claims one through four are untimely
15 and must be dismissed with prejudice. (Id. at 8-15.) Respondent further argues that claims two
16 through four are unexhausted and must be dismissed on that ground as well. (Id. at 16-17.) And
17 finally, respondent asserts that claims one through three must be dismissed because they fail to
18 state a claim upon which relief can be granted. (Id. at 17-19.)

19 In the remainder of the motion, respondent states his opposition to petitioner's request for
20 a stay to exhaust claims one through four in state court, as well as argues that granting a stay to
21 exhaust would be futile. (Id. at 19-23.)

22 **II. Legal Standard for Motion to Dismiss**

23 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a
24 complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that
25 is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic
26 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court must accept as true the allegations of
27 the complaint, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), and
28 construe the pleading in the light most favorable to plaintiff, Jenkins v. McKeithen, 395 U.S. 411,

1 421 (1969). Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
2 Haines v. Kerner, 404 U.S. 519, 520 (1972).

3 The court may consider facts established by exhibits attached to the complaint. Durning
4 v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts
5 that may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th
6 Cir. 1987); and matters of public record, including pleadings, orders, and similar papers filed with
7 the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

8 **III. Legal Analysis of Motion to Dismiss**

9 **A. Timeliness of Claims One through Four**

10 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all
11 petitions for writ of habeas corpus filed after the enactment of AEDPA. Lindh v. Murphy, 521
12 U.S. 320 (1997); Thomas v. Chappell, 678 F.3d 1086, 1101 (9th Cir. 2012). Petitioner filed his
13 initial petition on June 26, 2014. Therefore, the filing deadlines of AEDPA apply to the petition.

14 In most cases, AEDPA requires a state prisoner to seek federal habeas corpus relief within
15 one year after the state conviction becomes final. 28 U.S.C. § 2244(d); Brambles v. Duncan, 330
16 F.3d 1197, 1201 (9th Cir. 2003), amended in other respects by 342 F.3d 898 (9th Cir. 2003). The
17 period of “direct review” after which the state conviction becomes final under 28 U.S.C. §
18 2244(d)(1)(A) includes the 90-day period within which a petitioner can file a petition for a writ of
19 certiorari from the United States Supreme Court, even if the petitioner does not actually file such
20 a petition. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Because the California Supreme
21 Court denied petitioner’s appeal on October 31, 2012, the period of direct review ended 90 days
22 later, on January 30, 2013. Thus, the deadline for petitioner to file a petition for writ of habeas
23 corpus in federal court was one year after that, plus any time for tolling.

24 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
25 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
26 § 2244(d)(2). Petitioner filed petitions for habeas corpus in state court before filing this federal
27 petition. Petitioner’s final state habeas petition was denied on May 14, 2014. A timely federal
28 petition was filed on June 26, 2014. That petition, however, was filed on a pro se basis and

1 contained only three claims. (ECF No. 1.)

2 As noted above, the second amended petition was filed by appointed counsel for petitioner
3 and contains five claims, which do not mirror the language of the initial petition. Respondent
4 argues that claims one through four are untimely because they were filed after the one year
5 deadline (plus tolling) and do not relate back to any of the claims in the initial petition. (ECF No.
6 63.) Petitioner responds that each of the first four claims relates back to a claim in the initial
7 petition and, therefore, the first four claims of the second amended petition are timely. (ECF No.
8 67.)

9 (1) **“Relation Back” Legal Standard**

10 The filing of a petition for writ of habeas corpus in federal court does not toll the AEDPA
11 limitations period. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). But under Federal Rule of
12 Civil Procedure 15(c), a claim stated in a later-amended federal habeas petition may use the filing
13 date of the prior federal petition if that claim “relates back” to a claim in the earlier petition.
14 “Relation back” means there must be a “common core of operative facts” uniting the original and
15 newly exhausted claims. A claim does not relate back if it asserts a new ground for relief
16 supported by facts that differ in both time and type from those set forth in the original pleading.
17 Mayle v. Felix, 545 U.S. 644, 650 (2005); King v. Ryan, 564 F.3d 1133, 1142 (9th Cir. 2009)
18 (“newly exhausted” claims must relate back to previously exhausted claim in original federal
19 petition in order to benefit from the earlier filing date).

20 The Supreme Court has provided examples of cases where relation back was appropriate.
21 Mayle, 545 U.S. at 664 n.7. For instance, it has noted that relation-back was proper in Mandacina
22 v. United States, 328 F.3d 995, 1000-01 (8th Cir. 2003), where the original petition alleged
23 discovery violations and “the amended petition alleged the Government’s failure to disclose a
24 particular report.” Mayle, 545 U.S. at 664 n.7 (“Both pleadings related to evidence obtained at
25 the same time by the same police department”). In contrast, a claim that is “separated in time and
26 type” from the prior claim does not relate back; for example, in Hebner v. McGrath, 543 F.3d
27 1133, 1138 (9th Cir. 2008), the petitioner’s claim that jury instructions improperly lowered the
28 government’s burden of proof did not relate back to a claim that his due process rights were

1 violated by the improper introduction of evidence, since these claims did not share a “common
2 core of operative fact.” Id. at 1138-39.

3 When a newly-raised claim in an amended federal petition does not relate back to any
4 claim in the original petition, then that claim’s timeliness is calculated from the filing date of the
5 newly-amended petition. Ford v. Gonzalez, 683 F.3d 1230, 1237 n.3 (9th Cir. 2012) (“[A] new
6 claim in an amended petition relates back to avoid a limitations bar . . . only when it arises from
7 the same core of operative facts as a claim contained in the original petition.”) quoting Hebner,
8 543 F.3d at 1138-39.

9 **(2) Claim 1 of Second Amended Petition**

10 In claim one of the second amended petition, petitioner argues that he was “denied Due
11 Process by the lack of discovery and by the denial of an opportunity to make a well-founded
12 motion to suppress evidence.” (ECF No. 60-1 at 13.) Petitioner argues that this claim relates
13 back to the third claim of the original petition. (ECF No. 67 at 3-4.) Claim three in the original
14 petition alleged prosecutorial failure to disclose exonerating evidence, including the lease/sale
15 agreement for the property, the Proposition 215 authorizations for the cultivation, evidence that
16 the property was in foreclosure, and aerial photographs obtained by a civilian police agent. (ECF
17 No. 1 at 21-27.)

18 According to the second amended petition, the prosecution insisted during discovery that
19 there were no aerial photographs of the property and that no aerial surveillance had taken place.
20 (ECF No. 60-1 at 13.) At trial, Norman Andreini testified that he flew over the property, then
21 entered it the night before the search warrant was executed to verify that the marijuana plants
22 were still there. (Id.) Trial counsel for petitioner objected to this testimony on the ground of late
23 discovery, and requested an in-trial motion to suppress evidence. (Id.) The objection and request
24 for evidentiary hearing were denied by the trial court. (Id.) Claim one of the second amended
25 petition asserts that the ruling by the trial court was unreasonable and unconstitutional. (Id. at 13-
26 18.)

27 Petitioner argues that the “core of operative facts” of claim one and claim three are the
28 same: (1) Andreini’s testimony that he flew over the property, then entered it the night before the

1 search warrant was served, and (2) the prosecutor’s failure to disclose that information, and
2 insistence that no such thing had happened. (ECF No. 67 at 4.) Respondent contends, however,
3 that the second amended petition focuses on trial counsel’s late suppression and mistrial motions,
4 demonstrating that the facts necessary to prove petitioner’s new claim differ from the facts
5 necessary to pursue previous claim arising from failure to disclose evidence. (ECF No. 69 at 5.)

6 While claim three in the original petition is a Brady² claim that does not refer to a
7 potential motion to suppress, the core operative facts of that claim clearly overlap with the
8 foundation of claim one in the second amended petition. In Mandacina, the original petition
9 alleged discovery violations and “the amended petition alleged the Government’s failure to
10 disclose a particular report.” 328 F.3d at 1000-01. The Supreme Court, discussing Mandacina,
11 noted that “[b]oth pleadings related to evidence obtained at the same time by the same police
12 department.” Mayle, 545 U.S. at 664 n.7. Similarly, in the instant case, both claims relate back
13 to the same alleged non-disclosure by the government. Thus, even if the second amended petition
14 pursues a different legal argument, the foundation of the claim arises from the same core
15 operative fact as claim three of the original petition: the government failed to disclose certain
16 evidence before trial, which led to unconstitutional prejudice against petitioner.

17 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
18 Haines, 404 U.S. at 520. In Williams v. Kullman, 722 F.2d 1048, 1050 (8th Cir. 1983), the
19 Eighth Circuit stated that “due to the pro se petitioner’s general lack of expertise, courts should
20 review habeas petitions with a lenient eye, allowing borderline cases to proceed.” In granting
21 petitioner’s motion for relief from judgment, which vacated the earlier dismissal of this case, the
22 former magistrate judge assigned to this matter cited to this same passage in Williams and stated
23 that “[c]ertainly the Ninth Circuit would agree.” (ECF No. 38 at 6.) The undersigned adopts that
24 sentiment.

25 Where the operative facts of claims are the same, petitioner may make adjustments to
26 phraseology and revise the cause of action without violating the relation back doctrine. This is

27 ² Brady v. Maryland, 373 U.S. 83 (1963) (established that the prosecution must turn over all
28 evidence that might exonerate the defendant to the defense).

1 particularly true where the initial petition was filed without the assistance of counsel, and thus
2 requires a liberal construction. While petitioner has changed the cause of action concerning this
3 claim, he has not changed the core operative facts upon which he relies. Accordingly, claim one
4 relates back to claim three of the original petition and respondent's motion to dismiss claim one is
5 denied.

6 **(3) Claim 2 of Second Amended Petition**

7 In claim two of the second amended petition, petitioner claims that he was denied due
8 process by the lack of a record of events in the courtroom while the judge and attorneys were
9 discussing the case *in camera*. (ECF No. 60-1 at 18-19.) Specifically, petitioner alleges that
10 while the court reporter was with counsel and the judge in chambers, Andreini remained on the
11 witness stand and conversed with a detective about the case within earshot of the jury. (*Id.* at 19.)
12 Petitioner contends that the absence of a transcript of this interaction prejudiced him.

13 Petitioner alleges that this claim relates back to claim three of the original petition.³ (ECF
14 No. 67 at 4-5.) Claim three of the original petition asserts prosecutorial failure to disclose
15 exonerating evidence including the lease/sale agreement for the property, the Proposition 215
16 authorizations for the cultivation, evidence that the property was in foreclosure, and aerial
17 photographs obtained by a civilian police agent. (ECF No. 1 at 21-27.) The facts supporting
18 claim three in the original petition focus on what evidence petitioner was entitled to and whether
19 the government withheld that evidence.

20 The facts supporting claim two of the second amended petition relate solely to conduct
21 that purportedly occurred in the courtroom during petitioner's trial. While Andreini is mentioned
22 in both claims, that is the extent of their relation, as one claim focuses on Andreini's actions

23 ³ Petitioner clouds this argument, however, by asserting that claim two relates to claim one of the
24 second amended petition as well. (ECF No. 67 at 5.) It is not relevant to this analysis that one
25 claim in the second amended petition relates to another claim in the same petition. The purpose
26 of relation back analysis is to determine the connection between a claim filed after the expiry
27 statute of limitations and a claim filed before the expiration. Petitioner presents no legal support
28 for the assertion that this court can tie claim two of the second amended petition to the original
petition through another claim in the second amended petition. Accordingly, the undersigned's
analysis shall address only the contention that this claim relates back to claim three of the original
petition.

1 during trial and the other focuses on Andreini's (and the government's) actions taken before trial.
2 That claims share one fact in common "is not sufficient to conclude that they arise out of a
3 common core of operative facts." Schneider v. McDaniel, 674 F.3d 1144, 1151 (9th Cir. 2012).

4 Accordingly, claim two does not relate back to the original petition and must be
5 dismissed.

6 **(4) Claim 3 of Second Amended Petition**

7 Claim three of the second amended petition alleges that petitioner was denied due process
8 by lack of a record of the proceedings in chambers while the judge and attorneys were discussing
9 the case *in camera*. (ECF No. 60-1 at 19-21.) Petitioner alleges that this relates back to claim
10 three of the original petition. For reasons similar to claim two, this claim must also be dismissed
11 as untimely.

12 In the original petition, petitioner complained of a lack of transcripts amongst his
13 arguments for claim three. He specifically stated that "if petitioner Pryor had a copy of the
14 Reporter's Transcript, this petition could be much more exact in it's [sic] reference to statements
15 from the trial. The fact remains petitioner was denied access to exculpatory evidence which was
16 material and favorable to his defense." (ECF No. 1 at 25.) In his opposition to the dismissal
17 motion, petitioner quotes this passage from the original petition, asserting that it links the original
18 claim to claim three in the second amended petition. Petitioner's reference to transcripts in the
19 original petition is taken out of context, however. The quote is not part of petitioner's substantive
20 claim, but, rather, is an aside noting that, at the time of drafting the original petition, he did not
21 possess **any** transcripts to reference. (Id.) This is far from asserting a substantive claim that the
22 trial court did not create a sufficient record of the proceedings.

23 Additionally, petitioner argues that claim three of the original petition alleged a broad
24 cover-up orchestrated by the prosecutor's office in keeping certain exculpatory evidence out of
25 petitioner's possession. According to petitioner, the completion of the trial record "was a
26 prerequisite to making an effective argument of lack of disclosure of evidence of illegal search
27 and seizure." (ECF No. 67 at 6.) Thus, it appears, that petitioner is implying that he would have
28 needed the trial court record in order to effectively make the argument of a cover-up by the

1 prosecutor's office. This, however, does not make claim three of the second amended petition
2 relate any more to claim three of the original petition. The simple fact remains that claim three in
3 the original petition focuses entirely on the government's alleged withholding of exculpatory
4 evidence before trial, while claim three of the second amended petition arises from the trial
5 court's purported error in not maintaining a sufficient record. These are significantly different
6 claims.

7 Accordingly, the undersigned finds that claim three of the second amended petition does
8 not relate back to the original petition and must be dismissed as untimely.

9 **(5) Claims 4(a) and 4(b) of Second Amended Petition**

10 Petitioner does not contend that claims 4(a) and 4(b) of the second amended petition relate
11 back to any claim in the original petition. Instead, petitioner only argues that these claims relate
12 to claims two and three of the current petition. (ECF No. 67 at 7.) First, this argument does not
13 comport with the relation back doctrine, which requires a new claim to relate back to a timely
14 claim made in the original petition. See Ford, 683 F.3d at 1237 n. 3.

15 Second, the undersigned ruled above that claims two and three do not relate back to any
16 claim in the original petition and are therefore untimely. Thus, even if it were legally permissible
17 to extend the relation back doctrine from one claim in a current petition to another, claims 2 and 3
18 have been dismissed as untimely, so therefore, claims 4(a) and 4(b) would be untimely as well.

19 Accordingly, claims 4(a) and 4(b) of the second amended petition are untimely and must
20 be dismissed.

21 **(6) Claim 4(c) of the Second Amended Petition**

22 Petitioner next contends that claim 4(c) relates back to a distinct section of claim one, as
23 well as two sentences from claims two and three of the original petition. (ECF No. 67 at 7-8.)
24 Claim 4(c) alleges that petitioner was denied effective assistance of counsel by the failure to enter
25 the search warrant into the record at trial. (ECF No. 60 at 7.)

26 First, as with claim three above, petitioner argues that a sentence in the original petition
27 commenting on his lack of documents with which to work on the petition relates to claim 4(c).
28 Specifically, in claim two of the original petition, petitioner states: "Please note: Petitioner could

1 have been more precise in this petition except that he has Not received his copy of Reporter's
2 transcripts, All discovery, including the above referenced documents, probable cause affidavit's
3 search warrants, police reports, investigative notes and reports, interview tapes, notes and
4 documents related to prosecution and defense witnesses, have never been received by this
5 petitioner." (ECF No. 1 at 20.)

6 Petitioner's reference to the search warrant in the original petition is taken out of context.
7 The quote is not part of petitioner's substantive claim, but, rather, is an aside noting that, at the
8 time of drafting the original petition, he did not possess the search warrant to reference. (Id.)
9 This is far from asserting a substantive claim that the trial court did not create a sufficient record
10 of the proceedings. This is confirmed in the very next sentence of the original petition, in which
11 petitioner states that "[u]pon receipt of these documents, petitioner will be far better able to
12 perfect and amend this petition." (Id.) Thus, as with claim three, the commentary about not
13 having sufficient documentation while drafting the original petition is not relevant to the question
14 of whether claim 4(c) in the second amended relates back.

15 In claim three of the original petition, petitioner notes that he "has never seen any search
16 warrant, probable cause affidavits, notes related to investigation of his medical marijuana grows
17 himself." (ECF No. 1 at 24.) The substance of claim three of the original petition asserts
18 prosecutorial failure to disclose exonerating evidence including the lease/sale agreement for the
19 property, the Proposition 215 authorizations for the cultivation, evidence that the property was in
20 foreclosure, and aerial photographs obtained by a civilian police agent. (Id. at 21-27.) As with
21 the analysis of claim three of the second amended petition above, there is substantial difference
22 between the operative facts of the original and second amended petition, despite reference to the
23 same document (i.e., the search warrant in this instance).

24 Claim three in the original petition focuses entirely on the government's alleged
25 withholding of exculpatory evidence before trial, while claim 4(c) of the second amended petition
26 arises from the trial court's purported error in not maintaining a sufficient record. These are
27 significantly different claims dependent upon dissimilar operative facts. While claim 3 of the
28 original petition relies upon evidence that the prosecution inappropriately withheld

1 documentation before trial, claim 4(c) of the second amended petition depends upon the trial
2 court's failure to maintain an appropriate record. The core operative facts of these claims are
3 wholly different. See Schneider, 674 F.3d at 1151 (that claims share one fact in common "is not
4 sufficient to conclude that they arise out of a common core of operative facts.").

5 Accordingly, claim 4(c) of the second amended petition does not relate back to the
6 original petition and is therefore untimely.

7 (7) **Claim 4(d) of Second Amended Petition**

8 Claim 4(d) of the second amended petition contends that petitioner was denied effective
9 assistance of counsel because evidence of California's medical marijuana policies (the basis of
10 petitioner's defense) was not presented at trial. (ECF No. 60-1 at 22-23.) Claim one of the
11 original petition, ineffective assistance of counsel, included petitioner's complaint that counsel
12 failed to "provide expert witnesses to testify that in fact petitioner Pryor's medical marijuana
13 grows were in full compliance with all applicable state laws as outlined in proposition 215."
14 (ECF No. 1 at 12.) Petitioner further noted in the original petition that the trial judge admonished
15 counsel during trial for "failure to lay a proper foundation for admission of medical marijuana
16 evidence[.]" (Id.)

17 Respondent contends that these claims are so distinct that the relation back doctrine
18 cannot apply because claim one concerned the absence of a marijuana **expert** and claim 4(d)
19 concerned marijuana **policies**. (ECF No. 69 at 8.) To be sure, there is a difference between
20 failure to present policy evidence and failure to present an expert; however, the core operative
21 facts underlying each claim concern same core operative facts: trial counsel did not sufficiently
22 present the medical marijuana defense. As a pro se litigant, petitioner focused on the specific
23 issue of an expert as a means of delivering the medical marijuana defense at trial. (ECF No. 1 at
24 12.) The second amended petition pursues the same general argument as the original petition,
25 but, as drafted by appointed counsel, claim 4(d) states the issue in broader terms by focusing on
26 the type of evidence an expert witness may have delivered (i.e., testimony concerning medical
27 marijuana laws and policies in California).

28 ///

1 For these reasons, claim 4(d) of the second amended petition relates back to claim one of
2 the original petition and is therefore timely. Accordingly, the motion to dismiss is denied as to
3 this claim.

4 **B. Failure to State a Claim in Claim 1 of Second Amended Petition**

5 Respondent argues that claim one must be dismissed on the merits because it does not
6 raise a federal question. (ECF No. 63 at 18.) In claim one of the second amended petition,
7 petitioner alleges that he was “denied Due Process by the lack of discovery and by the denial of
8 an opportunity to make a well-founded motion to suppress evidence.” (ECF No. 60-1 at 13.)
9 Respondent asserts that the hearing process for challenging a search warrant is an issue of state
10 law, Cal. Penal Code § 1538.5, and therefore, petitioner may not challenge the process afforded
11 by the state court in a federal petition. See Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir.
12 1990). However, respondent misstates the ultimate conclusion of Gordon.

13 In Gordon, the petitioner contended that evidence found in his apartment where he was
14 arrested should have been suppressed under the fourth amendment, because the search warrant
15 was based upon false statements. Id. The facts in Gordon were uncertain as to whether the
16 petitioner did in fact litigate a fourth amendment claim in state court, but, nonetheless, the Ninth
17 Circuit ruled that the petitioner could not raise this issue in a federal habeas petition because he
18 had the opportunity to litigate his fourth amendment claim in state court. Id. Under California
19 law, a defendant can move to suppress evidence on the basis that it was obtained in violation of
20 the fourth amendment. See Cal. Penal Code § 1538.5.

21 The ruling in Gordon does not impede petitioner’s claim here though. In Stone v. Powell,
22 428 U.S. 465, 494-95 (1976), the Supreme Court held that “where the State has provided an
23 opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be
24 granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or
25 seizure was introduced at his trial.” Furthermore, “a federal court need not apply the exclusionary
26 rule on habeas review for a Fourth Amendment claim **absent a showing that the state prisoner**
27 **was denied an opportunity for full and fair litigation of that claim at trial and on direct**
28 **review.”** Id. (emphasis supplied). Here, petitioner alleges that he was denied “an opportunity

1 for full and fair litigation” of his fourth amendment claim because the trial court never held a
2 hearing on his motion, despite statutory authority for such a hearing. Accordingly, petitioner
3 presents a cognizable federal habeas claim that he was denied due process through the trial
4 court’s failure to grant him a hearing on his fourth amendment claim.

5 For these reasons, respondent’s motion to dismiss claim one on the merits is denied.

6 **C. Exhaustion of Claims**

7 Finally, respondent argues that claims two through four are unexhausted and must be
8 dismissed. As the court has already dismissed claims 2, 3, 4(a), 4(b), and 4(c), the undersigned
9 need not address this argument for those claims. As for claim 4(d), the court will address the
10 exhaustion issue in the context of petitioner’s motion to stay below.

11 **IV. Motion to Stay**

12 Petitioner requests a stay pursuant to Rhines v. Weber, 544 U.S. 269, 275-76 (2005),
13 asserting that claim 4(d) is supported by evidence of Tehama County policies to implement the
14 California Medical Marijuana Program, which must be presented to the state courts. (ECF No.
15 61.) Petitioner argues that claim 4(d) depends upon the introduction of the county protocols
16 concerning medical marijuana; the protocols are not available online, and so, they were obtained
17 by investigation services, which were available only after petitioner’s release from prison and the
18 appointment of counsel. (ECF No. 67 at 17.)

19 Rhines identified “limited circumstances” in which a district court may stay an entire
20 mixed petition -- including the unexhausted claims -- while a petitioner attempts to exhaust the
21 claims in state court. Rhines, 544 U.S. at 277-78. Such a stay and abeyance is only appropriate
22 where: (1) the petitioner has “good cause” for his failure to exhaust in state court; (2) the
23 unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner
24 intentionally engaged in dilatory litigation tactics. Rhines, 544 U.S. at 278. The Ninth Circuit
25 has clarified that “good cause” for failure to exhaust does not require “extraordinary
26 circumstances.” Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005).

27 Here, the court finds that petitioner has met the criteria set forth in Rhines for the issuance
28 of a stay. Petitioner satisfies the “good cause” requirement by his showing that he was limited in

1 his ability to obtain the evidence in question by his imprisonment. Respondent does not
2 challenge the assertion that the evidence in question required investigatory services not available
3 to petitioner when he was incarcerated. Additionally, the unexhausted claim is cognizable and
4 there is no indication that petitioner intentionally engaged in dilatory litigation tactics.

5 Accordingly, petitioner's motion for stay and abeyance is granted.

6 **V. Conclusion**

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. Petitioner's motion to stay (ECF No. 61) is granted;
- 9 2. Respondent's motion to dismiss (ECF No. 63) is granted in part and denied in part;
- 10 3. Petitioner may proceed with claims 1, 4(d), and 5 of the second amended petition;
- 11 4. This action is hereby stayed, and the Clerk of Court is directed to administratively
12 close the case;
- 13 5. Petitioner shall file and serve a status report in this case on the first court day of
14 each month; and
- 15 6. Petitioner shall file a motion to lift the stay of this action within thirty days after
16 petitioner is served with the California Supreme Court's order disposing of his state exhaustion
17 petition.

18 Dated: July 5, 2017

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22 DEBORAH BARNES
23 UNITED STATES MAGISTRATE JUDGE
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