



1 In this action, petitioner asserts the following claims:

- 2 1. That his Fifth Amendment rights were violated when he was “manipulated by the  
3 courts to take the stand and incriminate myself” (ECF No. 1 at 15);
- 4 2. That his Sixth Amendment confrontation clause rights were violated when the trial  
5 court allowed Anthony Barnes to testify regarding statements made by the victim  
6 before his death;
- 7 3. That he was convicted of first-degree murder without sufficient evidence;
- 8 4. That (a) the trial court erred by allowing mentally-incompetent witness Loretta Turpen  
9 to testify and (b) petitioner’s trial counsel was ineffective for not impeaching Turpen  
10 based on her mental health issues;
- 11 5. A second claim that the evidence was insufficient to support a first-degree murder  
12 conviction;
- 13 6. That his Sixth Amendment right to an impartial jury was violated because a juror  
14 knew the victim’s grandfather and “hung out” with the victim’s family outside the  
15 courtroom during trial;
- 16 7. That the trial judge erred by giving instructions on lying-in-wait and pre-textual self-  
17 defense because (a) the evidence did not support the instructions and (b) the two  
18 instructions oppose each other;
- 19 8. That trial counsel was ineffective for failing to review the instructions, particularly  
20 CALCRIM 3472;
- 21 9. That trial counsel was ineffective for failing to request proper jury instructions,  
22 particularly CALCRIM 522;
- 23 10. That trial counsel was ineffective because he didn’t object to the prosecutor’s  
24 argument that the hearsay testimony of Anthony Barnes established that the murder  
25 was first-degree;
- 26 11. That trial counsel was ineffective because of various conflicts of interest and refusals  
27 to proceed in the manner petitioner wished;
- 28

- 1 12. That the prosecutor unlawfully testified regarding the import of the position of the
- 2 victim's body;
- 3 13. That the prosecutor unlawfully influenced the jury by presenting argument that was
- 4 not supported by the evidence;
- 5 14. That the prosecutor unlawfully misled the jury with a power-point display that did not
- 6 contain "the mental element" of first- and second-degree murder;
- 7 15. That the prosecutor unlawfully presented conflicting jury instructions (on pre-textual
- 8 self-defense and lying-in-wait);
- 9 16. That the prosecutor unlawfully coached Loretta Turpen and knowingly allowed her to
- 10 commit perjury;
- 11 17. That the trial court erred by failing, sua sponte, to give CALCRIM 8.47 and 4.21
- 12 regarding voluntary manslaughter and voluntary intoxication.

13 Of the claims included in this action, eleven were not included in petitioner's request for  
14 California Supreme Court review (claims one, two, four, six, ten, eleven, twelve, thirteen,  
15 fourteen, sixteen, and seventeen).

## 16 **II. The Motion to Dismiss**

17 Respondent argues that the petition should be dismissed because some of the claims raised  
18 by petitioner in the instant case have not been exhausted. ECF No. 17. Petitioner requests that  
19 the court to stay the case while he returns to state court to exhaust the unexhausted claims. ECF  
20 Nos. 19, 27, 30.

### 21 **A. The Exhaustion Requirement**

22 A district court may not grant a petition for a writ of habeas corpus unless the petitioner  
23 has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). A state will not be deemed  
24 to have waived the exhaustion requirement unless the state, through counsel, expressly waives the  
25 requirement. 28 U.S.C. § 2254(b)(3).

26 Exhaustion of state remedies requires that petitioners fairly present federal claims to the  
27 highest state court, either on direct appeal or through state collateral proceedings, in order to give  
28 the highest state court "the opportunity to pass upon and correct alleged violations of its

1 prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (some internal quotations  
2 omitted). "[A] state prisoner has not 'fairly presented' (and thus exhausted) his federal claims in  
3 state court unless he specifically indicated to that court that those claims were based on federal  
4 law." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d 904 (9th Cir.  
5 2000). "[T]he petitioner must make the federal basis of the claim explicit either by citing federal  
6 law or the decisions of federal courts, even if the federal basis is self-evident . . . ." *Id.* (citations  
7 omitted); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) ("[A] claim for relief in  
8 habeas corpus must include reference to a specific federal constitutional guarantee, as well as a  
9 statement of the facts that entitle the petitioner to relief."); *Duncan*, 513 U.S. at 365-66 (to  
10 exhaust a claim, a state court "must surely be alerted to the fact that the prisoners are asserting  
11 claims under the United States Constitution.").

12 In addition to identifying the federal basis of his claims in the state court, the petitioner  
13 must also fairly present the factual basis of the claim in order to exhaust it. *Baldwin v. Reese*, 541  
14 U.S. 27, 29 (2004); *Robinson v. Schriro*, 595 F.3d 1086, 1101 (9th Cir. 2010). "[T]he petitioner  
15 must . . . provide the state court with the operative facts, that is, 'all of the facts necessary to give  
16 application to the constitutional principle upon which [the petitioner] relies.'" *Davis v. Silva*, 511  
17 F.3d 1005, 1009 (9th Cir. 2008) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.  
18 1958)).

19 Where a federal habeas petitioner has failed to exhaust a claim in the state courts  
20 according to these principles, she may ask the federal court to stay its consideration of her petition  
21 while she returns to state court to complete exhaustion. Two procedures may be used in staying a  
22 petition – one provided for by *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002) and the other by  
23 *Rhines v. Weber*, 544 U.S. 269 (2005). *King v. Ryan*, 564 F.3d 1133, 1138-41 (9th Cir. 2009).  
24 Under the *Kelly* procedure, the district court may stay a petition containing only exhausted claims  
25 and hold it in abeyance pending exhaustion of additional claims which may then be added to the  
26 petition through amendment. *Kelly*, 315 F.3d at 1070-71; *King*, 564 F.3d at 1135. If the federal  
27 petition contains both exhausted and unexhausted claims (a so-called "mixed" petition), a  
28 petitioner seeking a stay under *Kelly* must first dismiss the unexhausted claims from the petition

1 and seek to add them back in through amendment after exhausting them in state court. *King*, 564  
2 F.3d at 1138-39. The previously unexhausted claims, once exhausted, must be added back into  
3 the federal petition within the statute of limitations provided for by 28 U.S.C. § 2244(d)(1),  
4 however. *King*, 564 F.3d at 1140-41. Under that statute, a one-year limitation period for seeking  
5 federal habeas relief begins to run from the latest of the date the judgment became final on direct  
6 review, the date on which a state-created impediment to filing is removed, the date the United  
7 States Supreme Court makes a new rule retroactively applicable to cases on collateral review or  
8 the date on which the factual predicate of a claim could have been discovered through the  
9 exercise of due diligence. 28 U.S.C. § 2241(d)(1). A federal habeas petition does not toll the  
10 limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181-82  
11 (2001).

12 Under *Rhines*, a district court may stay a mixed petition in its entirety, without requiring  
13 dismissal of the unexhausted claims, while the petitioner attempts to exhaust them in state court.  
14 *King*, 564 F.3d at 1139-40. Unlike the *Kelly* procedure, however, *Rhines* requires that the  
15 petitioner show good cause for failing to exhaust the claims in state court prior to filing the  
16 federal petition. *Rhines*, 544 U.S. at 277-78; *King*, 564 F.3d at 1139. In addition, a stay pursuant  
17 to *Rhines* is inappropriate where the unexhausted claims are “plainly meritless” or where the  
18 petitioner has engaged in “abusive litigation tactics or intentional delay.” *Id.*

### 19 **B. Analysis**

20 There is no dispute here that some of the claims raised in the petition have not been  
21 presented to the California Supreme Court. Accordingly, the petition is “mixed” and must be  
22 dismissed unless petitioner has shown good cause under *Rhines* to stay proceedings while he  
23 exhausts the unexhausted claims. *King*, 564 F.3d at 1140 (noting that, to obtain a stay without  
24 showing good cause under *Kelly*, the petitioner must first file an amended petition that contains  
25 only exhausted claims). Petitioner states only that he “was under the understanding my appeal  
26 attorney did everything he was suppose to do [sic].” ECF No. 19 at 1. Petitioner’s mistaken  
27 impression that his attorney had exhausted the claims does not constitute “good cause” under  
28 *Rhines*. *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008). Petitioner also states that

1 he thought that a federal habeas petition was “the next thing” after filing a habeas petition in the  
2 state superior court. Petitioner’s ignorance of the law is also not “good cause.” *Hamilton v.*  
3 *Clark*, No. CIV S-08-1008 EFB P, 2010 U.S. Dist. LEXIS 20035, at \*4 (E.D. Cal. Feb. 9, 2010)  
4 (“Ignorance of the law and limited access to a law library are common among pro se prisoners  
5 and do not constitute good cause for failure to exhaust.”).

6 Because the petition contains unexhausted claims and petitioner has not provided good  
7 cause for staying the case, the undersigned recommends that the petition be dismissed. The  
8 dismissal should be without prejudice and with leave to amend, however, to allow petitioner to  
9 file an amended petition containing only his exhausted claims (and he may thereafter seek a stay  
10 under *Kelly* while he presents the remaining claims to the California Supreme Court).

### 11 **III. Conclusion and Recommendation**

12 For the foregoing reasons, it is hereby RECOMMENDED that:

- 13 1. The September 1, 2016 motion to dismiss (ECF No. 17) be granted, and that the  
14 petition be dismissed with leave to amend to allow petitioner the opportunity to file a  
15 fully exhausted petition and then seek a stay under *Kelly v. Small*, 315 F.3d 1063 (9th  
16 Cir. 2002).
- 17 2. Petitioner’s motions to stay (ECF Nos. 27, 30) be denied without prejudice.

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

25 DATED: February 9, 2017.

26   
27 EDMUND F. BRENNAN  
28 UNITED STATES MAGISTRATE JUDGE