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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY LEE KING,
Petitioner,
v.
DAVE DAVEY,
Respondent.

No. 2:16-cv-1464-WBS-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel in an action brought under 28 U.S.C. § 2254. The court dismissed the petition on March 27, 2017 as partially unexhausted. ECF No. 36. Petitioner filed an amended petition on March 31, 2017 (ECF No. 38) and a motion to stay the case on April 14, 2017 (ECF No. 40). Respondent opposes the motion to stay, arguing that the amended petition includes an unexhausted claim and that a stay would be futile because any claims that would be added back after exhaustion in the California Supreme Court would not be timely. ECF No. 44. For the reasons that follow, it is recommended that the motion to stay be denied as premature. It is further recommended that the case be dismissed without prejudice and that petitioner be allowed the opportunity to file an amended petition containing only his exhausted claims. Accordingly, the court vacates the schedule set in the order filed April 6, 2017 (ECF No. 39) directing respondent to file an answer to the amended petition. A new briefing schedule will issue when appropriate.

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1 **I. Background**

2 Petitioner was convicted of first degree murder with a sentencing enhancement in the
3 Sacramento County Superior Court. ECF No. 14, Resp.'s Notice of Lodging Document in Paper,
4 Lodged Document (hereinafter Lod. Doc.) No. 1. He received a sentence of fifty-years-to-life on
5 April 25, 2014. *Id.* The California Court of Appeal affirmed the conviction on May 28, 2015.
6 Lod. Doc. No. 2. The California Supreme Court denied review on August 26, 2015. Lod. Doc.
7 Nos. 3, 4. Petitioner has filed one state habeas petition, in the state superior court. He has not
8 filed a habeas petition in the California Supreme Court.

9 In his original petition, petitioner asserted the following claims:

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

- 1 9. That trial counsel was ineffective for failing to request proper jury instructions,
2 particularly CALCRIM 522;
- 3 10. That trial counsel was ineffective because he didn't object to the prosecutor's
4 argument that the hearsay testimony of Anthony Barnes established that the murder
5 was first-degree;
- 6 11. That trial counsel was ineffective because of various conflicts of interest and refusals
7 to proceed in the manner petitioner wished;
- 8 12. That the prosecutor unlawfully testified regarding the import of the position of the
9 victim's body;
- 10 13. That the prosecutor unlawfully influenced the jury by presenting argument that was
11 not supported by the evidence;
- 12 14. That the prosecutor unlawfully misled the jury with a power-point display that did not
13 contain "the mental element" of first- and second-degree murder;
- 14 15. That the prosecutor unlawfully presented conflicting jury instructions (on pre-textual
15 self-defense and lying-in-wait);
- 16 16. That the prosecutor unlawfully coached Loretta Turpen and knowingly allowed her to
17 commit perjury;
- 18 17. That the trial court erred by failing, sua sponte, to give CALCRIM 8.47 and 4.21
19 regarding voluntary manslaughter and voluntary intoxication.

20 The court concluded in its prior order that claims one, two, four, six, ten, eleven, twelve, thirteen,
21 fourteen, sixteen, and seventeen had not been exhausted. ECF Nos. 35, 36. The court dismissed
22 the petition and invited petitioner to file an amended petition containing only exhausted claims
23 and to thereafter seek a stay of the proceeding while exhausting any remaining claims in the state
24 court. *Id.*

25 Petitioner thereafter filed an amended petition. ECF No. 38. From review of that
26 document, these claims can be discerned:

- 27 (A) That he was convicted of first-degree murder without sufficient evidence (*id.* at 11,
28 110);

- 1 (B) That the trial court erred by instructing the jury on lying-in-wait because the evidence
2 did not support the instruction (*id.* at 12);
- 3 (C) That a model jury instruction provided to the jury (CALCRIM 521) erroneously failed
4 to require that lying-in-wait be the means by which the murder is accomplished (*id.* at
5 16);
- 6 (D) That cumulative errors (premised on “issues of self-defense, provocation, and the
7 degree of the homicide”) rendered the trial unfair (*id.* at 20);
- 8 (E) That the trial court erroneously provided the jury with an instruction on pretextual
9 self-defense (CALCRIM 3472) (*id.* at 66);
- 10 (F) That his attorney rendered ineffective assistance by failing to object to CALCRIM
11 3472 (*id.* at 95);
- 12 (G) That his attorney rendered ineffective assistance by failing to request a jury instruction
13 on the effect of provocation on the degree of murder (CALCRIM 522) (*id.* at 105);
- 14 (H) That the trial court had a sua sponte duty to give CALCRIM 522, which it failed to do
15 (*id.* at 106);
- 16 (I) That the prosecutor committed misconduct by requesting CALCRIM 521 and 3472
17 (*id.* at 109);
- 18 (J) That the prosecutor committed misconduct by misleading the jury with false evidence
19 (*id.* at 5);
- 20 (K) That the prosecutor committed misconduct by seeking a conviction for first-degree
21 murder even though the evidence supported a lesser charge (*id.*).

22 **II. The Motion to Stay**

23 Petitioner has filed a one-page motion to stay the case under *Kelly v. Small*, 315 F.3d 1063
24 (9th Cir. 2002), while he exhausts other claims in state court. ECF No. 40. Respondent argues
25 that a stay is inappropriate because petitioner has included unexhausted claims in the amended
26 petition. ECF No. 44. Respondent further argues that a stay would be futile because the claims
27 that have not yet been exhausted would be untimely if added back to the petition now. *Id.*

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1 **A. The Exhaustion Requirement**

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

6 Exhaustion of state remedies requires that petitioners fairly present federal claims to the
7 highest state court, either on direct appeal or through state collateral proceedings, in order to give
8 the highest state court “the opportunity to pass upon and correct alleged violations of its
9 prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (some internal quotations
10 omitted). “[A] state prisoner has not ‘fairly presented’ (and thus exhausted) his federal claims in
11 state court unless he specifically indicated to that court that those claims were based on federal
12 law.” *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d 904 (9th Cir.
13 2000). “[T]he petitioner must make the federal basis of the claim explicit either by citing federal
14 law or the decisions of federal courts, even if the federal basis is self-evident” *Id.* (citations
15 omitted); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (“[A] claim for relief in
16 habeas corpus must include reference to a specific federal constitutional guarantee, as well as a
17 statement of the facts that entitle the petitioner to relief.”); *Duncan*, 513 U.S. at 365-66 (to
18 exhaust a claim, a state court “must surely be alerted to the fact that the prisoners are asserting
19 claims under the United States Constitution.”).

20 In addition to identifying the federal basis of his claims in the state court, the petitioner
21 must also fairly present the factual basis of the claim in order to exhaust it. *Baldwin v. Reese*, 541
22 U.S. 27, 29 (2004); *Robinson v. Schriro*, 595 F.3d 1086, 1101 (9th Cir. 2010). “[T]he petitioner
23 must . . . provide the state court with the operative facts, that is, ‘all of the facts necessary to give
24 application to the constitutional principle upon which [the petitioner] relies.’” *Davis v. Silva*, 511
25 F.3d 1005, 1009 (9th Cir. 2008) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.
26 1958)).

27 Where a federal habeas petitioner has failed to exhaust a claim in the state courts
28 according to these principles, she may ask the federal court to stay its consideration of her petition

1 while she returns to state court to complete exhaustion. Two procedures may be used in staying a
2 petition – one provided for by *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002) and the other by
3 *Rhines v. Weber*, 544 U.S. 269 (2005). *King v. Ryan*, 564 F.3d 1133, 1138-41 (9th Cir. 2009).
4 Under the *Kelly* procedure, the district court may stay a petition containing only exhausted claims
5 and hold it in abeyance pending exhaustion of additional claims which may then be added to the
6 petition through amendment. *Kelly*, 315 F.3d at 1070-71; *King*, 564 F.3d at 1135. If the federal
7 petition contains both exhausted and unexhausted claims (a so-called “mixed” petition), a
8 petitioner seeking a stay under *Kelly* must first dismiss the unexhausted claims from the petition
9 and seek to add them back in through amendment after exhausting them in state court. *King*, 564
10 F.3d at 1138-39. The previously unexhausted claims, once exhausted, must be added back into
11 the federal petition within the statute of limitations provided for by 28 U.S.C. § 2244(d)(1),
12 however. *King*, 564 F.3d at 1140-41. Under that statute, a one-year limitation period for seeking
13 federal habeas relief begins to run from the latest of the date the judgment became final on direct
14 review, the date on which a state-created impediment to filing is removed, the date the United
15 States Supreme Court makes a new rule retroactively applicable to cases on collateral review or
16 the date on which the factual predicate of a claim could have been discovered through the
17 exercise of due diligence. 28 U.S.C. § 2241(d)(1). A federal habeas petition does not toll the
18 limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181-82
19 (2001).

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

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B. Analysis

The amended petition contains potentially three claims of prosecutorial misconduct (labeled as (I), (J), and (K), above). The undersigned has reviewed petitioner’s petition for review in the California Supreme Court. Lod. Doc. No. 3. It does not contain any claim of prosecutorial misconduct. These claims are therefore unexhausted.

Because the petition contains unexhausted claims, the undersigned recommends that motion to stay be denied as premature and the petition be dismissed. Because the motion to stay is premature, the court need not at this time analyze whether a stay would be futile due to the timeliness of the currently unexhausted claims. The dismissal should be without prejudice and with leave to amend, however, to allow petitioner one more opportunity to file an amended petition containing only his exhausted claims – that is, claims he has already raised in the California Supreme Court. He may thereafter seek a stay under *Kelly* while he presents the remaining claims to the California Supreme Court.

III. Conclusion and Recommendation

For the foregoing reasons, it is hereby ORDERED that respondent’s June 5, 2017 request to stay the briefing schedule (ECF No. 48) is GRANTED and the briefing schedule set forth in ECF No. 39 is hereby VACATED.

It is further RECOMMENDED that the April 14, 2017 motion to stay (ECF No. 40) be DENIED, and the amended petition be dismissed with leave to amend to allow petitioner the opportunity to file a fully exhausted petition and then seek a stay under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002).

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: July 11, 2017.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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