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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ERION DEMONTA VERNADO,
Petitioner,
v.
KIMBERLY A. SEIBEL,
Respondent.

No. 2:17-CV-2413-TLN-DMC-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding with retained counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 16, 2017, Petitioner filed a motion to stay proceedings (ECF No. 3). On August 8, 2018, this Court issued findings and recommendations recommending the District Court Judge deny Petitioner’s motion to stay proceedings (ECF No. 10). Petitioner timely filed objections to this Court’s findings and recommendations on September 21, 2018 (ECF No. 14). On November 13, 2018, this Court ordered Respondents to file an answer to the petition within 60 days (ECF No. 22). Then, on November 15, 2018, Petitioner filed a renewed motion to stay proceedings (ECF No. 23). This Court subsequently vacated its August 8, 2018, findings and recommendations. Thus, pending before this Court are Petitioner’s motions for a stay of proceedings (ECF Nos. 3 and 23). For the reasons discussed below, the undersigned recommends that Petitioner’s motions for a stay be granted.

1 **I. PROCEDURAL BACKGROUND**

2 Petitioner, along with his co-defendants, Antwaan Anderson, Victor Garret, and
3 Vance Hicks were charged with six counts of second degree robbery (counts 1-4 and 7-8) and two
4 counts of kidnapping. Petitioner and Anderson were alleged to have used firearms in the
5 commission of those crimes. Petitioner and co-defendants Anderson, Garret, and Hicks, were
6 also charges with one count of attempted robbery and assault with a firearm. Petitioner and
7 Garret were alleged to have used and discharged firearms in the commission of these crimes.

8 Petitioner and Garret were tried together and on September 7, 2010, the jury found
9 Garrett guilty of all charges. The jury found Petitioner not guilty as to the 4 robberies in counts
10 1-4, guilty of the two robberies in counts 7 and 8, guilty of the attempted robbery and assault with
11 a firearm, and deadlocked on the charges of kidnapping. Petitioner was retried on the remaining
12 charges and on September 23, 2011, a jury found Petitioner guilty of both counts of kidnapping.

13 Petitioner timely filed a notice of appeal on December 19, 2012, with the
14 California Court of Appeal Third Appellate District. On June 30, 2014, the court of appeal
15 affirmed Petitioner's conviction and on July 31, 2014, Petitioner filed a petition for review with
16 the California Supreme Court. The People also filed a petition for review with the California
17 Supreme Court on August 4, 2014, and the court granted the People's petition for review on
18 September 24, 2014. The California Supreme Court subsequently transferred the case back to the
19 Court of Appeal on August 17, 2016, with instructions to vacate and reconsider in light of People
20 v. Franklin, 63 Cal.4th 261 (2016). On January 20, 2017, the Court of Appeal affirmed
21 Petitioner's conviction and sentence but remanded the case to the trial court for the limited
22 purpose of developing the record under California Penal Code section 3051 and 4801. Petitioner
23 filed a petition for rehearing that was denied on January 27, 2017. Petitioner filed a timely
24 petition for review and the California Supreme Court denied the petition on April 12, 2017.
25 Petitioner filed his petition for a writ of habeas corpus with this Court on November 15, 2017, and
26 his motion to stay the proceedings on November 16, 2017, and his renewed motion to stay on
27 November 15, 2018.

1 **II. HABEAS PETITION AND MOTION TO STAY**

2 The petition in this case raises four primary claims: (1) insufficient evidence
3 related to the substantial movement element of the kidnapping charge; (2) jury instruction error
4 related to the kidnapping charge; (3) evidentiary error related to the admission of alleged
5 character evidence; and (4) evidentiary error related to the identification of Petitioner. Each claim
6 listed above is fully exhausted. Petitioner has identified an additional fifth claim of ineffective
7 assistance of appellate counsel. Petitioner asserts that appellate counsel was ineffective in failing
8 to assert an argument related to California Proposition 57.¹ This claim is unexhausted. For that
9 reason, Petitioner seeks to stay this action to exhaust the ineffective assistance of counsel claim
10 and amend the present petition upon exhaustion pursuant to Kelly v. Small, 315 F.3d 1063 (9th
11 Cir. 2003).

12
13 **III. GOVERNING LEGAL PRINCIPLES**

14 Habeas petitioners are required to exhaust state remedies before seeking relief in federal
15 court. 28 U.S.C. § 2254(b). The exhaustion doctrine ensures that state courts will have a
16 meaningful opportunity to consider allegations of constitutional violation without interference
17 from the federal judiciary. Rose v. Lundy, 455 U.S. 509, 515 (1982). Exhaustion requires fair
18 presentation of the substance of a federal claim to the state courts. Picard v. Connor, 404 U.S.
19 270, 276 (1971). In order to exhaust state remedies, a federal claim must be presented to the
20 state's highest court, which is the California Supreme Court. Castille v. Peoples, 489 U.S. 346
21 (1989).

22 When a stay-and-abeyance motion is filed, the analysis depends on whether the petition is
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24 ¹ “In November 2016 the [California] electorate passed Proposition 57, the “Public Safety and
25 Rehabilitation Act of 2016” (Proposition 57). Proposition 57 prohibits prosecutors from charging
26 juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile
27 court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct
28 what we will call a “transfer hearing” to determine whether the matter should remain in juvenile
court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court
can the juvenile be tried and sentenced as an adult.” People v. Superior Court (Laura), 4 Cal. 5th
299 (2018).

1 mixed or fully exhausted. See Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005). If the
2 petitioner seeks a stay-and-abeyance order as to a mixed petition containing both exhausted and
3 unexhausted claims, the request is analyzed under the standard announced by the Supreme Court
4 in Rhines v. Weber, 544 U.S. 269 (2005). See Jackson, 425 F.3d at 661. If, however, the petition
5 currently on file is fully exhausted, and what petitioner seeks is a stay-and-abeyance order to
6 exhaust claims not raised in the current federal petition, the analysis discussed in Kelly v. Small,
7 315 F.3d 1063 (9th Cir. 2003) overruled on other grounds by Robbins v. Carey, 481 F.3d 1143,
8 applies. See Jackson, 425 F.3d at 661.

9 Under the Kelly procedure, the district court may stay a petition containing only
10 exhausted claims and hold it in abeyance pending the exhaustion of additional claims. Kelly, 315
11 F.3d at 1070-71; King, 564 F.3d at 1135. Once the additional claims have been exhausted, the
12 petitioner may then amend his federal habeas petition, adding them to the original petition, as
13 long as the claims are not time-barred. King, 564 F.3d at 1135, 1140-41. Unlike the procedure
14 created by Rhines, a Kelly stay “does not require that a petitioner show good cause for his failure
15 to exhaust state court remedies.” Id. at 1135. However, a petitioner's use of the procedure
16 outlined in Kelly is subject to the requirement of Mayle v. Felix, 545 U.S. 644 (2005), that any
17 newly exhausted claims a petitioner seeks to add to a pending federal habeas petition must be
18 timely or relate back to claims contained in the original petition that were exhausted at the time of
19 filing. King, 564 F.3d at 1143.

20 21 **IV. ANALYSIS**

22 Petitioner’s pending habeas petition contains only exhausted claims and for that
23 reason, Petitioner’s motion to stay falls squarely within the Kelly framework. It is thus within the
24 Courts discretion to grant a stay pending the exhaustion of Petitioner’s ineffective assistance of
25 counsel claim. Though good cause is not required under Kelly, courts often look at various
26 factors including the merit of the claim and if the claim will be time bared. See Daniels v. Davey,
27 No. 1:15-cv-01211-MJS, 2015 WL 559846, at *2 (E.D. Cal. Sept. 22, 2015) (holding a court
28 must deny a Kelly stay if the claims are facially without merit); Hastings v. Gipson, No. 1:14-cv-

1 01271-LJO, 2015 WL 4095583, at *4 (E.D. Cal. Jul. 7, 2015) (denying a Kelly stay because
2 petitioner will not be able to amend his unexhausted claims back because they are untimely).
3 Additionally, it is well established that courts, in general, should not grant a stay where there is
4 intent by the petitioner to delay or harass, but courts should grant a stay to avoid piecemeal
5 litigation. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 987–988 (9th Cir.1998).

6 Here, there is no indication that Petitioner’s ineffective assistance of counsel claim
7 is meritless. In fact, the facts outlined in both Petitioner’s motion for a stay and renewed motion
8 for a stay indicate that the claim could have merit. Further, it also appears that Petitioner would
9 be able to timely amend his habeas petition to include the ineffective assistance of counsel claim
10 after exhaustion. This is especially true based on Petitioner’s representation that the state court
11 has recalled the remittitur and that the AEDPA statute of limitations has now tolled. See Reply to
12 Opposition to Renewed Motion to Stay. There is also no evidence that Petitioner is attempting to
13 delay the process or harass Respondents by seeking a stay. Rather, it appears that Petitioner’s
14 habeas counsel identified a genuine issue related to Petitioner’s former appellate counsel and is
15 diligently pursuing this issue in state court in order to exhaust the claim. It is also noteworthy that
16 Respondent raised no argument challenging the merits of Petitioner’s motions to stay.²

17 Additionally, the Court finds the California Supreme Court’s decision in People v.
18 Superior Court (Laura), 4 Cal. 5th 299 (2018), regarding the retroactive application of Proposition
19 57, and Petitioner’s representation that Laura applies to his case, to be a particularly compelling
20 reason for granting Petitioner’s stay. If the California state courts proceed with the process
21 endorsed by Laura, Petitioner’s case could be remanded to juvenile court where it could either
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23 ² Respondents filed no opposition to Petitioner’s first motion to stay, but did file an opposition to
24 Petitioner’s renewed motion to stay. In Respondent’s opposition to Petitioner’s renewed motion
25 to stay they present two arguments: (1) the law-of-the-case doctrine compels this Court to again
26 recommend denial of Petitioner’s motions to stay based on its prior findings and
27 recommendations; and (2) Petitioner presents no new facts, circumstances, or law, that would
28 support a Kelly stay. This Court finds both arguments unpersuasive. As the findings and
recommendations filed by this Court on August 8, 2018, have neither been adopted nor rejected
by the District Court Judge, this Court is free to vacate and modify its findings and
recommendations as to the pending stay motions. This Court further believes that Petitioner has
presented new facts, circumstances, and law that support a Kelly stay, as discussed above.

1 proceed back to state criminal court, in which case Petitioner could fully exhaust state court
2 remedies and then amend this habeas petition, or the case could remain in juvenile court, which
3 would make this habeas petition moot. Because the underlying state proceedings have the
4 potential to fundamentally effect this habeas petition it would be imprudent to deny Petitioner's
5 stay motion. Therefore, for the reasons discussed above, the instant federal habeas corpus
6 petition should be stayed and held in abeyance pending exhaustion of the ineffective assistance of
7 appellate counsel claim.

8
9 **V. CONCLUSION**

10 Accordingly, IT IS HEREBY RECOMMENDED that Petitioner's motions for a stay-and-
11 abeyance order (ECF Nos. 3 and 23) be GRANTED.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court. Responses to objections shall be filed within 14 days after service of
16 objections. Failure to file objections within the specified time may waive the right to appeal. See
17 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 Dated: December 18, 2018



22 DENNIS M. COTA
23 UNITED STATES MAGISTRATE JUDGE
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