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

CHRISTOPHER NIX,

 Petitioner,

 v.

JIM ROBINSON,

 Respondent.

No. 2:21-CV-0659-WBS-DMC-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the Court is Respondent’s motion to dismiss, ECF No. 13. Petitioner has not filed an opposition.¹

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¹ Respondent’s motion was filed on December 15, 2021. See ECF No. 13. As of February 15, 2022, Petitioner had not filed an opposition and the Court recommended Respondent’s motion be granted as unopposed under Eastern District of California Local Rule 230(c), (l). See ECF No. 15. On April 22, 2022, the District Judge remanded the matter for further consideration in light of arguments raised in Petitioner’s late-file objections. See ECF No. 18. On May 23, 2022, the Court provided Petitioner an opportunity to file an opposition brief within 30 days. See ECF No. 19. To date, Petitioner has not filed an opposition. The Court will nonetheless consider the arguments raised in Petitioner’s late-filed objections, as directed by the District Judge.

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I. BACKGROUND

Petitioner filed his original petition on April 5, 2021, raising two claims. See ECF No. 1. In this petition, Petitioner alleged: (1) the trial court failed to perform its function as a “gate-keeper”; and (2) the evidence was insufficient to support the conviction. See id. at 3-4. Petitioner provides few, if any, supporting facts. See id. Petitioner names “The People” in his petition. See id. at 1. On September 8, 2021, the Court dismissed the original petition with leave to amend to name the correct respondent. See ECF No. 5.

Petitioner timely complied and this action currently proceeds on Petitioner’s first amended petition raising four claims for relief. See ECF No. 7. In addition to the two claims raised in the original petition, Petitioner alleges two new claims – claims three and four. See id. at 5. In the new third claim, Petitioner contends: “The lying-in-wait enhancement finding violates the 8th Amendment to the federal Constitution because it is over-inclusive.” Id. In the new fourth claim, Petitioner contends: “Under new California law, I can no longer be charged with or sentenced for murder.” Id. As with the original petition, none of the claims raised in the amended petition is supported by meaningful reference to facts or evidence. As to why Petitioner is presenting new claims in the amended petition not raised in the original petition, Petitioner addresses only the fourth claim, stating that he could not raise it before due to a recent change in state law. See id.

Petitioner states that he pursued claims one, two, and three through the California Supreme Court on direct review. See id. at 2. Petitioner affirmatively states that he did not file any state court post-conviction actions. See id.

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II. DISCUSSION

Respondent argues that Petitioner’s third and fourth claims must be dismissed because they were filed beyond the one-year statute of limitations. See ECF No. 13. Respondent also argues the fourth claim should be dismissed because it is unexhausted. See id. Respondent does not raise any procedural challenge to the first and second claims.

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1 **A. Statute of Limitations**

2 Federal habeas corpus petitions must be filed within one year from the later of: (1)
3 the date the state court judgment became final; (2) the date on which an impediment to filing
4 created by state action is removed; (3) the date on which a constitutional right is newly-
5 recognized and made retroactive on collateral review; or (4) the date on which the factual
6 predicate of the claim could have been discovered through the exercise of due diligence. See 28
7 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
8 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
9 review. See 28 U.S.C. § 2244(d)(1).

10 Where a petition for review by the California Supreme Court is filed and no
11 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
12 begins running the day after expiration of the 90-day time within which to seek review by the
13 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).
14 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year
15 limitations period begins to run the day after certiorari is denied or the Court issued a merits
16 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for
17 review by the California Supreme Court is filed, the conviction becomes final 40 days following
18 the Court of Appeal’s decision, and the limitations period begins running the following day. See
19 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the
20 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the
21 limitations period begins running the following day. See Cal. Rule of Court 8.308(a). If the
22 conviction became final before April 24, 1996 – the effective date of the statute of limitations –
23 the one-year period begins to run the day after the effective date, or April 25, 1996. See Miles v.
24 Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999).

25 The limitations period is tolled, however, for the time a properly filed application
26 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
27 “properly filed,” the application must be authorized by, and in compliance with, state law. See
28 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v.

1 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
2 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
3 and the failure to comply with those time limits precludes a finding that the state petition is
4 properly filed). A state court application for post-conviction relief is “pending” during all the
5 time the petitioner is attempting, through proper use of state court procedures, to present his
6 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
7 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549
8 U.S. 327 (2007) (holding that federal habeas petition not tolled for time during which certiorari
9 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between
10 state court applications, however, there is no tolling for that period of time. See Carey v. Saffold,
11 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as
12 untimely, the federal court must independently determine whether there was undue delay. See id.
13 at 226-27.

14 There is no tolling for the interval of time between post-conviction applications
15 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183
16 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no
17 tolling for the period between different sets of post-conviction applications. See Biggs v.
18 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct
19 review and the filing of a state post-conviction application does not toll the limitations
20 period. See Nino, 1983 F.3d at 1006-07.

21 As to commencement of the limitations period and statutory tolling, Respondent
22 contends:

23 On September 27, 2019, the California Court of Appeal affirmed
24 the judgment. (Lod. Doc. 2.) Petitioner filed a petition for review with the
25 California Supreme Court, which was denied on January 2, 2020. (Lod.
26 Docs. 3-4.) The time to seek direct review ended on April 1, 2020, when
27 the ninety-day period to file a petition for writ of certiorari with the United
28 States Supreme Court expired. The one-year limitations period
commenced running the following day—April 2, 2020. Patterson v.
Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).
Thus, the last day to file a federal petition was on April 1, 2021. Petitioner,
however, filed his amended federal petition six months later on October
18, 2021.

1 * * *

2 The proper filing of a state post-conviction application with respect
3 to the pertinent judgment or claim tolls the one-year limitations period. 28
4 U.S.C. § 2244(d)(2). Here, Petitioner did not file any state post-conviction
5 collateral challenges.

6 ECF No. 13, pgs. 2-3.

7 The Court agrees and adopts Respondent’s timeline. In support of his motion to
8 dismiss, Respondent has lodged relevant state court records. See ECF No. 14. These records
9 reflect that the California Court of Appeal affirmed the judgment and conviction on September
10 27, 2019. See ECF No. 14-2. The records further reflect that the California Supreme Court
11 denied review of January 2, 2020. See ECF No. 14-4. Petitioner did not seek certiorari in the
12 United States Supreme Court, and the time to do so expired on April 1, 2020 – 90 days after the
13 California Supreme Court’s decision on direct review. The one-year limitations period began to
14 run the following day and expired on April 1, 2021.

15 This matter originated in the Ninth Circuit Court of Appeals with a habeas petition
16 filed in that court. The appellate court transferred the matter to this Court on April 12, 2022, with
17 instruction that the petition be deemed filed as of March 31, 2021. See ECF No. 1. Thus, if the
18 amended petition relates back in time to the filing of the original petition in the appellate court,
19 the amended petition would be timely.

20 Respondent argues that the amended petition does not relate back. See ECF No.
21 13, pgs. 3-4. According to Respondent:

22 In the original federal petition, Petitioner raised the first two claims—
23 the trial court failed to perform its role as “gate-keeper;” and (2) insufficient
24 evidence. (Dkt. 1.) Petitioner filed a first amended petition, again raising the
25 first two claims but adding two new claims—the lying in wait enhancement
26 violates the Eighth Amendment and the murder conviction can no longer
27 stand under California law (claims three and four). (Dkt. 7.)

28 Because the two new claims (claims three and four) in the amended
petition do not rely on the same core of operative facts as the claims in the
original petition, and the new claims are based on completely different legal
theories, they do not relate back under Fed. R. Civ. P. 15(c)(1)(B). *See Mayle*
v. Felix, 545 U.S. at 664; *see also Hebner v. McGrath*, 543 F.3d 1133, 1137
(9th Cir. 2008).

ECF No. 13, pgs. 3-4.

1 Under Federal Rule of Civil Procedure 15(c)(2), which is applicable in habeas
2 proceedings, amendments made after the statute of limitations has run relate back to the date the
3 original pleading was filed if the original and amended pleadings arise out of the same conduct,
4 transaction, or occurrence. See Mayle v. Felix, 545 U.S. 644, 656 (2005). An amended habeas
5 petition does not relate back when it asserts a new ground for relief supported by facts that differ
6 in both time and type from those the original petition set forth. See id. at 650. Relation back
7 requires a common core of operative facts uniting the original and new claims. See id. at 659.

8 In the habeas context, the Ninth Circuit held that the words “same conduct,
9 transaction, or occurrence” meant that an amended habeas petition would relate back so long as
10 any new claim stems from the petitioner’s trial, conviction, or sentence. See id. at 656-67. The
11 Supreme Court noted that, under this formulation, “. . . virtually any new claim introduced in an
12 amended petition will relate back, for federal habeas claims, by their very nature, challenge the
13 constitutionality of a conviction or sentence. . . .” Id. at 657. The majority of circuits have
14 adopted a narrower rule in light of AEDPA’s one-year statute of limitations. See id. The narrow
15 rule allows relation back only when “. . .the claims added by amendment arise from the same
16 core facts as the timely claims and not when the new claims depend upon events separate in
17 ‘both time and type’” from the originally raised claims. Id. In determining whether the amended
18 claim and original claim arose from a common core of operative facts, the Supreme Court in
19 Mayle compared the facts required to answer the dispositive questions presented as to each
20 claim. See id. at 661.

21 Respondent’s motion is devoid of any particularized analysis as to the third and
22 fourth claims, and this Court is not inclined to agree with Respondent’s conclusion. Contrary to
23 Respondent’s conclusory analysis, Petitioner’s third and fourth claims arise from the same
24 operative facts; the conviction at issue in the first and second claims. Claim three challenges a
25 sentence enhancement and claim four challenges the overall conviction and sentence. Both arise
26 from the same state court criminal proceedings, conviction, and sentence.

27 The Court finds that the amended petition relates back in time to the filing of the
28 original petition and is, therefore, timely as to all claims raised.

1 **B. Exhaustion**

2 Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required
3 before claims can be granted by the federal court in a habeas corpus case. See Rose v. Lundy,
4 455 U.S. 509 (1982); see also Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003); Hunt v. Pliker,
5 336 F.3d 839 (9th Cir. 2003).² The exhaustion doctrine is based on a policy of federal and state
6 comity, designed to give state courts the initial opportunity to correct alleged constitutional
7 deprivations. See Picard v. Connor, 404 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518.
8 “A petitioner may satisfy the exhaustion requirement in two ways: (1) by providing the highest
9 state court with an opportunity to rule on the merits of the claim . . .; or (2) by showing that at the
10 time the petitioner filed the habeas petition in federal court no state remedies are available to the
11 petitioner and the petitioner has not deliberately by-passed the state remedies.” Batchelor v.
12 Cupp , 693 F.2d 859, 862 (9th Cir. 1982) (citations omitted). Exhaustion is not a jurisdictional
13 requirement and the court may raise the issue sua sponte. See Simmons v. Blodgett, 110 F.3d 39,
14 41 (9th Cir. 1997).

15 Regardless of whether the claim was raised on direct appeal or in a post-conviction
16 proceeding, the exhaustion doctrine requires that each claim be fairly presented to the state’s
17 highest court. See Castille v. Peoples, 489 U.S. 346 (1989). Although the exhaustion doctrine
18 requires only the presentation of each federal claim to the highest state court, the claims must be
19 presented in a posture that is acceptable under state procedural rules. See Sweet v. Cupp, 640
20 F.2d 233 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is denied by
21 the state courts on procedural grounds, where other state remedies are still available, does not
22 exhaust the petitioner’s state remedies. See Pitchess v. Davis, 421 U.S. 482, 488 (1979); Sweet,
23 640 F.2d at 237-89.

24 Respondent argues that claim four raised in the amended petition is unexhausted.
25 Petitioner concedes the point, admitting in the amended petition that he did not present the claim
26 to the California Supreme Court. The first amended petition thus contains both exhausted claims

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28 ² Claims may be denied on the merits notwithstanding lack of exhaustion. See 28
U.S.C. § 2254(b)(2).

1 (claims one, two, and three) and an unexhausted claim (claim four).

2 When faced with petitions containing both exhausted and unexhausted claim
3 (mixed petitions), the Ninth Circuit held in Ford v. Hubbard that the district court is required to
4 give two specific warnings to pro se petitioners: (1) the court could only consider a stay-and-
5 abeyance motion if the petitioner chose to proceed with his exhausted claims and dismiss the
6 unexhausted claims; and (2) federal claims could be time-barred upon return to federal court if he
7 opted to dismiss the entire petition to exhaust unexhausted claims. See 330 F.3d 1086, 1099 (9th
8 Cir. 2003). However, the Supreme Court held in Pliler v. Ford that the district court is not
9 required to give these particular warnings. See 542 U.S. 225, 234 (2004).³ Furthermore, the
10 district court is not required to sua sponte consider stay and abeyance in the absence of a request
11 from the petitioner, see Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir. 2007), or to inform the
12 petitioner that stay and abeyance may be available, see Brambles v. Duncan, 412 F.3d 1066,
13 1070-71 (9th Cir. 2005). Therefore, in the absence of a stay-and-abeyance motion, the district
14 court should dismiss mixed petitions and need not provide any specific warnings before doing so.
15 See Robbins, 481 F.3d at 1147 (citing Rose, 455 U.S. at 510 (holding that the petitioner has the
16 “choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas
17 petition to present only exhausted claims to the district court”)).

18 As instructed by the District Judge, the undersigned has considered Petitioner’s
19 objections to the original findings and recommendations. In his objections, Petitioner argues the
20 merits of his various claims and does not address the procedural issues raised in Respondent’s
21 motion. See ECF No. 17. In particular, Petitioner does not respond by way of a request for a
22 stay-and-abeyance order to allow for exhaustion of the fourth claim. See id. The lodged state
23 court records confirm that Petitioner did not present the fourth claim in his petition for direct
24 review filed in the California Supreme Court. See ECF No. 14-3. Because claim four has never

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26 ³ The Supreme Court did not address the propriety of Ninth Circuit’s three-step
27 stay-and-abeyance procedure which involves dismissal of unexhausted claims from the original
28 petition, stay of the remaining claims pending exhaustion, and amendment of the original petition
to add newly exhausted claims that then relate back to the original petition. See Pliler, 542 U.S.
at 230-31 (citing Calderon v. United States Dist. Ct. (Taylor), 134 F.3d 981, 986-88 (9th Cir.
1998)).

1 been presented to the California Supreme Court, it is unexhausted and must be dismissed.

2 The Court declines to recommend dismissal of the entire petition because it is
3 mixed and one claim of four is unexhausted. Rather, the Court will recommend dismissal of
4 claim four only. The Court will further recommend that Respondent be directed to answer claims
5 one, two, and three on the merits.

6
7 **III. CONCLUSION**

8 Based on the foregoing, the undersigned recommends that:

- 9 1. Respondent's motion to dismiss, ECF No. 13, be granted in part;
10 2. Petitioner's fourth claim be dismissed as unexhausted; and
11 3. Respondent be directed to file an answer to the first amended petition as to
12 the first, second, and third claims.

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

19
20 Dated: September 12, 2022



21 DENNIS M. COTA
22 UNITED STATES MAGISTRATE JUDGE