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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY MICHAEL CAYLOR,
Petitioner,
v.
P. COVELLO,
Respondent.

No. 2:22-cv-01896-DJC-CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se in this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Currently pending before the court is petitioner’s motion for a stay and abeyance and respondent’s motion to dismiss petitioner’s mixed § 2254 application. ECF Nos. 5, 14. Respondent has filed an opposition to the motion for a stay and abeyance. For the reasons discussed below, the undersigned recommends that petitioner’s motion for a stay and abeyance be granted in part and denied in part. Based on this recommendation, it is further recommended that respondent’s motion to dismiss be denied without prejudice to raising the statute of limitations defense once the stay of this case is lifted.

I. Factual and Procedural History

Petitioner was convicted following a jury trial in the Sacramento County Superior Court of First Degree Murder; Attempted Murder; First Degree Robbery; First Degree Burglary; Assault with a Firearm; Felon in Possession of a Firearm; and Theft. He was sentenced to life

1 without the possibility of parole plus additional determinate prison terms. Petitioner was tried
2 jointly with his codefendant, Kari Ann Hamilton, who was his girlfriend at the time of the offense
3 and his current wife.¹

4 In his habeas corpus application, petitioner raises four claims for relief. First, petitioner
5 contends that the trial court erred in denying his motions to replace appointed counsel pursuant to
6 People v. Marsden, 2 Cal.3d 118 (1970). ECF No. 1 at 5. Next, petitioner asserts that the trial
7 court denied him his Sixth Amendment right of self-representation when it denied his motion
8 pursuant to Faretta v. California, 422 U.S. 806 (1975). ECF No. 1 at 7. Third, petitioner alleges
9 that his right to due process was violated based on the trial court's admission of videotape
10 evidence of a prior bad act involving a handgun. ECF No. 1 at 8. Last, petitioner raises a
11 separate due process challenge based on the trial court's admission of cumulative and overly
12 prejudicial evidence of his use of racial and ethnic slurs. ECF No. 1 at 10.

13 In his opening brief to the California Court of Appeal, petitioner raised these same four
14 claims for relief. After consolidating petitioner's appeal with his codefendant's, the California
15 Court of Appeal affirmed petitioner's conviction and sentence on May 20, 2021 in a joint
16 unpublished memorandum decision.² ECF No. 15-1.

17 Petitioner filed a petition for review in the California Supreme Court on June 21, 2021
18 raising only his Marsden and Faretta claims for relief. ECF No. 1 at 20-56. Petitioner's
19 codefendant filed a separate petition for review in the California Supreme Court. See ECF No. 1
20 at 92-116. As relevant to the pending motions, the codefendant raised the federal evidentiary
21 challenge related to the admission of prior bad act evidence arguing that it denied her a fair trial
22 on the attempted murder charge. See ECF No. 1 at 106-116. The California Supreme Court
23 jointly denied the petitions for review on August 11, 2021. ECF No. 1 at 18.

24 On February 7, 2023, respondent filed a motion to dismiss the federal habeas petition
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26 ¹ Ms. Hamilton's federal habeas corpus petition is also pending before the undersigned. See
27 Hamilton v. Allison, 2:22-cv-01901-CKD (E.D. Cal.). By order dated March 31, 2023, these two
28 habeas petitions have been related. ECF No. 16.

² The codefendant's sentence was modified to stay the term imposed for vehicle theft, but
otherwise affirmed.

1 arguing that claims three and four are unexhausted because they were not included in the petition
2 for review in the California Supreme Court.³ ECF No. 14. Respondent also indicates that
3 petitioner did not join any of the claims raised in his codefendant’s petition for review in the
4 California Supreme Court. ECF No. 14 at 2. “Unless Petitioner amends the Petition to strike the
5 unexhausted claims, the Petition should be dismissed.” ECF No. 14 at 1.

6 Petitioner has filed a separate motion for a stay and abeyance pursuant to Rhines v.
7 Weber, 544 U.S. 269, 278 (2005), or, in the alternative, Kelly v. Small, 315 F.3d 1063 (9th Cir.
8 2003). ECF No. 5. In the motion, petitioner indicates that he seeks to return to state court to
9 exhaust claims of ineffective assistance of his trial and appellate counsel that he has discovered
10 after being provided his trial transcripts. ECF No. 5. Petitioner asserts that he is not seeking a
11 stay of these proceedings for any improper purpose or to “manipulate the system.” ECF No. 5 at
12 4. In a declaration filed in support of the motion, petitioner avers that he has good cause for not
13 previously exhausting these claims due to prison conditions during the COVID-19 pandemic.
14 ECF No. 5 at 7.

15 Respondent filed an opposition to the motion for a stay and abeyance asserting that
16 petitioner does not demonstrate good cause or that the unexhausted claims are potentially
17 meritorious to be entitled to a Rhines stay. ECF No. 12. To the extent that petitioner seeks to
18 exhaust his evidentiary challenges raised in claims three and four of the petition, respondent
19 indicates that they may be time-barred following a Kelly stay. ECF No. 12. Moreover, since
20 petitioner does not fully identify all of the unexhausted claims that he seeks to present in state
21 court, respondent submits that “this Court cannot adequately determine whether a Kelly stay”
22 would be futile or not. ECF No. 12 at 3. Respondent also points out that petitioner does not
23 allege that he has commenced state habeas proceedings raising any ineffective assistance of
24 counsel claim. ECF No. 12. A review of online state court databases did not reveal any pending
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26 ³ Respondent filed relevant portions of the state court record along with the motion to dismiss
27 including state habeas corpus petitions filed in the Sacramento County Superior Court. See ECF
28 No. 15. Because all of petitioner’s state habeas corpus petitions were filed in the trial court and
adjudicated before his direct appeal was decided, they are not relevant for purposes of resolving
the pending motions.

1 habeas petitions. For all these reasons, respondent asks the court to deny petitioner’s motion for a
2 stay pursuant to both Rhines and Kelly.

3 **II. Legal Standards**

4 **A. Exhaustion of State Court Remedies**

5 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
6 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement
7 by providing the highest state court with a full and fair opportunity to consider each habeas claim
8 before presenting it to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton
9 v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). The prisoner must “fairly present” both the
10 operative facts and the federal legal theory supporting his federal claim to the state's highest
11 court, “thereby alerting that court to the federal nature of the claim.” Baldwin v. Reese, 541 U.S.
12 27, 29 (2004); see Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003), overruled on other
13 grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). The United States Supreme Court
14 has held that a federal district court may not entertain a petition for habeas corpus unless the
15 petitioner has exhausted state remedies with respect to each of the claims raised. Rose v. Lundy,
16 455 U.S. 509 (1982) (establishing the total exhaustion rule).

17 **B. Stay and Abeyance**

18 The court may stay a mixed federal habeas application if petitioner demonstrates (1) good
19 cause for the failure to previously exhaust the claims in state court, (2) the claims at issue
20 potentially have merit, and (3) petitioner has been diligent in pursuing relief. See Rhines v.
21 Weber, 544 U.S. at 278; Mena v. Long, 813 F.3d 907, 910-12 (9th Cir. 2016) (applying the stay
22 and abeyance procedure to wholly unexhausted petitions). If petitioner fails to establish any of
23 these three factors then a Rhines stay is not appropriate.

24 In determining what constitutes good cause sufficient for a Rhines stay, the Ninth Circuit
25 Court of Appeals has determined that a petitioner does not have to demonstrate extraordinary
26 circumstances. Jackson v. Roe, 425 F.3d 654, 661-662 (9th Cir. 2005). The legal standard for
27 cause to excuse a procedurally defaulted claim boils down to objective factors external to the
28 prisoner. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasizing that to establish cause

1 for a procedural default, a petitioner must show that “some objective factor external to the
2 defense impeded counsel’s efforts to comply with the State’s procedural rule.”).

3 The second type of a stay is referred to as a “Kelly” stay. In Kelly v. Small, 315 F.3d
4 1063 (9th Cir. 2003), a stay and abeyance involves the following three-step process: (1) the
5 petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in
6 abeyance the amended, fully exhausted petition, allowing petitioner the opportunity to return to
7 state court to exhaust the deleted claims; and, (3) petitioner later amends his petition and re-
8 attaches the newly-exhausted claims to the original petition. This is a more cumbersome
9 procedure than a Rhines stay because it requires a prisoner to file multiple amended federal
10 habeas petitions, but it does not require petitioner to demonstrate good cause for the failure to
11 exhaust. See King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009). However, a Kelly stay runs the
12 risk of preventing review on the merits of any unexhausted claim for relief due to the one year
13 statute of limitations governing federal habeas claims. See King, 564 F.3d at 1140-41
14 (emphasizing that a “petitioner seeking to use the Kelly procedure will be able to amend his
15 unexhausted claims back into his federal petition once he has exhausted them **only** if those claims
16 are determined to be timely. Demonstrating timeliness will often be problematic under the now-
17 applicable legal principles.”) (emphasis added); see also 28 U.S.C. § 2244(d)(1)(stating that a one
18 year period of limitation shall apply to all federal habeas petitions challenging a state court
19 judgment).

20 III. Analysis

21 After reviewing the petition for review filed in the California Supreme Court, the
22 undersigned finds that petitioner has not properly exhausted his evidentiary challenges raised in
23 claims three and four of the pending federal habeas petition.⁴ See Baldwin v. Reese, 541 U.S. 27,

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25 ⁴ Although petitioner does not contend that he properly exhausted claim three because it was
26 included in his co-defendant’s petition for review, the undersigned has considered that issue, but
27 ultimately concluded that petitioner did not fairly present it to the California Supreme Court
28 because he did not join in or incorporate by reference his co-defendant’s claims for relief. See
ECF No. 1 at 20-56; see also Cal. R. Ct. 8.504(e)(3) (specifically prohibiting incorporation by
reference unless it relates to “a petition, an answer, or a reply filed by another party in the same
case or filed in a case that raises the same or similar issues and in which a petition for review is

1 32 (2004) (holding that a claim is not properly exhausted if a state court “must read beyond a
2 petition or a brief... in order to find material” that alerts it to a federal claim); see also Wooten v.
3 Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008) (finding that “Wooten’s cumulative error claim
4 was not ‘fairly presented’ to the California Supreme Court, despite the fact that he presented it to
5 the California Court of Appeal.”); Castillo v. McFadden, 399 F.3d 993, 1000 (9th Cir. 2005)
6 (holding that “[t]o exhaust his claim, Castillo must have presented his federal, constitutional issue
7 before the Arizona Court of Appeals within the four corners of his appellate briefing.”). These
8 claims were omitted from his petition for review. As a result, his pending federal habeas petition
9 contains both exhausted and unexhausted claims for relief rendering it a mixed petition.

10 **A. Rhines Stay**

11 Pursuant to Rhines, this court may stay the pending mixed habeas application if petitioner
12 demonstrates (1) good cause for the failure to previously exhaust the claims in state court, (2) the
13 claims at issue potentially have merit, and (3) diligence in pursuing relief. Rhines, 544 U.S. at
14 278. A Rhines stay is not appropriate if any of these three factors are not met. As good cause for
15 a stay, petitioner contends that Mule Creek State Prison did not operate a “steady institutional
16 program” including regular law library access from May 11, 2020 to September 2022 due to the
17 COVID-19 pandemic. ECF No. 5 at 7. During this same time period, petitioner also contracted
18 COVID-19 twice and lost two family members.⁵ ECF No. 5 at 8. The legal standard to establish
19 good cause for a stay is similar to the good cause standard used to excuse procedurally defaulted
20 federal habeas claims. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasizing that to
21 establish cause for a procedural default, a petitioner must show that “some objective factor
22 external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.”).
23 The court will assume, without deciding, that sporadic law library access and contraction of the
24 COVID-19 virus constitutes good cause for purposes of Rhines as both were factors beyond
25 _____
pending or has been granted.”).

26 ⁵ The court accepts petitioner’s sworn declaration as evidence tendered in support of his request
27 for a stay. See Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014) (emphasizing that “[w]hile a
28 bald assertion cannot amount to a showing of good cause, a reasonable excuse, supported by
evidence to justify a petitioner’s failure to exhaust, will.”).

1 petitioner's control.⁶

2 The second factor for a Rhines stay requires the unexhausted claims to have potential
3 merit. Rhines v. Weber, 544 U.S. at 278. "A federal habeas petitioner must establish that at least
4 one of his unexhausted claims is not 'plainly meritless' in order to obtain a stay under Rhines."
5 Dixon v. Baker, 847 F.3d 714, 722 (9th Cir. 2017) (quoting Rhines, 544 U.S. at 277). In
6 recognition of the comity and federalism problems that are created by assessing the merits of
7 unexhausted claims before a state court has had a chance to rule on them, the Ninth Circuit has
8 determined that this standard is met unless "it is perfectly clear that the petitioner has no hope of
9 prevailing" in state court. Dixon, 847 F.3d at 722 (citing Cassett v. Stewart, 406 F.3d 614, 624
10 (9th Cir. 2005). In this case, the undersigned finds that petitioner has not demonstrated that the
11 ineffective assistance of counsel claims that he wants to exhaust in state court have potential
12 merit.⁷ In fact, petitioner only states that "issues that have come to the petitioner after being
13 provided records, transcripts of the state matter which do indicate ineffective assistance of
14 counsel on both the trial [sic] and appellate counsel's part...." ECF No. 5 at 1. Petitioner does
15 not even attempt to explain how his trial or appellate counsels' performance fell below an
16 objective standard of reasonableness or how such deficient performance resulted in prejudice.
17 See Strickland v. Washington, 466 U.S. 668 (1984). Absent this information, the undersigned
18 finds that petitioner has not met his burden of demonstrating that the unexhausted ineffective
19 assistance of counsel claims have potential merit. As a result, the court recommends denying
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21 ⁶ Additionally, to the extent that petitioner's briefing in this court can liberally be construed as
22 arguing that he thought his counsel properly exhausted the evidentiary claims in his petition for
23 review, this does not constitute good cause to support a Rhines stay. See Wooten v. Kirkland,
24 540 F.3d 1019, 1023-1024 (9th Cir. 2008). "To accept that a petitioner's 'impression' that a
25 claim had been included in an appellate brief constitutes 'good cause' would render stay-and-
obey [sic] orders routine.... Such a scheme would run afoul of Rhines and its instruction that
district courts should only stay mixed petitions in 'limited circumstances.'" Id. at 1024.

26 ⁷ According to petitioner's motion for a stay, he seeks to return to state court merely to exhaust
27 new ineffective assistance of counsel claims. He does not separately mention the evidentiary
28 challenges that were raised in the California Court of Appeal. As a result, the undersigned does
not address these unexhausted claims for relief in the context of petitioner's motion for a stay and
abeyance.

1 petitioner's motion for a Rhines stay.⁸

2 **B. Kelly Stay**

3 In the alternative, petitioner requests a Kelly stay. Here again, the court need not decide
4 the issue of good cause for a stay pursuant to Kelly. Respondent's only objection to granting
5 petitioner a Kelly stay is based on the potential statute of limitations bar that it might create for
6 any newly exhausted claims.⁹ See ECF No. 12. However, even respondent acknowledges that
7 "this Court cannot adequately determine whether a Kelly stay" would be futile or not since
8 petitioner does not identify what ineffective assistance of counsel claims he intends to exhaust.
9 ECF No. 12 at 3. Therefore, the undersigned cannot find at this early stage in the proceedings
10 that a Kelly stay would be futile. For these reasons, the court recommends granting petitioner's
11 motion for a Kelly stay and denying respondent's motion to dismiss without prejudice to raising
12 the statute of limitations issue after the stay is lifted.

13 **IV. Plain Language Summary for Pro Se Party**

14 The following information is meant to explain this order in plain English and is not
15 intended as legal advice.

16 After reviewing the record and the motion for a stay, the court recommends that your
17 request for a Rhines stay be denied, but that your request for a Kelly stay be granted. The
18 undersigned further recommends denying respondent's motion to dismiss without prejudice to
19 raising the statute of limitations defense once the stay of this case is lifted. **This legal opinion**
20 **does not constitute a determination by the court that any of the unexhausted claims for**
21 **relief will be deemed timely filed and will ultimately be reviewed on the merits.**

22 If you disagree with any of these recommendations, you have 14 days to explain why it is
23

24 ⁸ In the interests of judicial economy, the undersigned finds it unnecessary to address the
25 remaining Rhines factor of diligence.

26 ⁹ If a petitioner's newly-exhausted claims are untimely, he may amend his petition to include them
27 only if they share a "common core of operative facts" with the exhausted claims in the original
28 federal petition. See King, 564 F.3d at 1140–41; see also Duncan v. Walker, 533 U.S. 167, 172–
75 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas petition does
not toll the statute of limitations).


1 not the correct outcome in your case. Label your explanation “Objections to Magistrate Judge’s
2 Findings and Recommendations.” The district court judge assigned to your case will review any
3 objections and make the final decision in your case.

4 Accordingly, IT IS HEREBY RECOMMENDED that:

- 5 1. Petitioner’s motion for a stay (ECF No. 5) be denied to the extent that it requests a
6 Rhines stay but granted to the extent that it seeks a Kelly stay.
- 7 2. Respondent’s motion to dismiss (ECF No. 14) be denied without prejudice to raising
8 the statute of limitations defense once the stay of this case is lifted.
- 9 3. Petitioner be directed to file an amended § 2254 petition within 30 days from the
10 adoption of these Findings and Recommendations which deletes claims three and four
11 of his original § 2254 petition.
- 12 4. The Clerk of Court be directed to stay these proceedings once petitioner files the
13 amended § 2254 petition in compliance with number three.
- 14 5. Petitioner be further directed to file a status report with the court every 90 days
15 indicating what step(s) he has taken to exhaust his state court remedies.
- 16 6. Petitioner be ordered to file a motion to lift the stay of this case within 30 days from
17 the date the California Supreme Court issues an opinion on state habeas.

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.” Any response to the
23 objections shall be served and filed within fourteen days after service of the objections. The
24 parties are advised that failure to file objections within the specified time may waive the right to
25 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 Dated: May 31, 2023

27 
28 CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE