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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DESHAWN BROADNAX,)	Civil No. 12cv560 GPC (RBB)
)	
Petitioner,)	ORDER DENYING MOTION FOR STAY
)	AND ABEYANCE [ECF NO. 8]
v.)	
)	
MATTHEW CATE,)	
)	
Respondent.)	
_____)	

Petitioner Deshawn Broadnax, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus on March 5, 2012 [ECF Nos. 1, 7]. On March 9, 2012, the district court dismissed the Petition but gave Broadnax until May 15, 2012, to file a first amended petition. (Order 3, Mar. 9, 2012, ECF No. 3.) On March 22, 2012, Petitioner filed a "Notice Regarding an Extension of Time in Which to File Petition for Writ of Habeas Corpus in State Court" [ECF No. 8]. Broadnax maintains that he has begun to identify "Potential Issues" and requests time "To Complete [his] Review Of The Issues, Ensure The Issues [are] Complete, Identify/Research Issues, And Write Petition for Writ of Habeas Corpus in the State Court." (Notice Regarding Extension

1 Time 1, ECF No. 8.) The Court construed this as a motion to stay
2 and abey any subsequently filed first amended federal petition.
3 (Mins., Mar. 29, 2012, ECF No. 9.)

4 Broadnax later submitted a First Amended Petition, which was
5 filed nunc pro tunc to May 7, 2012 [ECF No. 16]. There, he
6 contests his convictions for attempted intimidation of a witness,
7 inducing a witness to give false information about a crime, and
8 two counts of first-degree murder. (See First Am. Pet. 6-7, 27-
9 28, 38-39, 44, 51-52, ECF No. 16.)¹ Petitioner challenges these
10 convictions on several bases, including, in ground one, the
11 adequacy of the jury instructions used at trial. (Id. at 6-7.)
12 In ground two, he contests the denial of his motion for a new
13 trial. (Id. at 27-28.) And in ground three, Broadnax disputes
14 the sufficiency of the evidence supporting his conviction for
15 dissuading a witness and, alternatively, contends that the trial
16 court erred in omitting an element of that offense. (Id. at 38-
17 39, 44.)

18 Respondent filed an "Answer to the Petition for Writ of
19 Habeas Corpus" on July 2, 2012, along with a memorandum of points
20 and authorities and a notice of lodgment [ECF No. 21]. On July
21 17, 2012, Cate filed an "Amended Answer to First Amended Petition
22 for Writ of Habeas Corpus" [ECF No. 23].

23 Broadnax later filed a "Motion and Declaration for
24 Appointment of Counsel," which was filed nunc pro tunc to May 24,
25

26
27 ¹ Because Broadnax's First Amended Petition and "Notice
28 Regarding an Extension of Time in Which to File Petition for Writ
of Habeas Corpus in State Court" are not consecutively paginated,
the Court will cite to each using the page numbers assigned by the
electronic case filing system.

1 2012 [ECF No. 20]. In that motion, Petitioner clarified that the
2 new claims he seeks to exhaust in state court are for ineffective
3 assistance of counsel and prosecutorial misconduct. (Mot. & Decl.
4 Appointment Counsel 1, ECF No. 20.) That motion was denied on
5 August 6, 2012, (ECF No. 24); nevertheless, the Court will take
6 judicial notice of statements made by Broadnax in the motion and
7 accompanying declaration. See Fed. R. Evid. 201(b).

8 On September 12, 2012, Cate filed an "Opposition to Motion
9 for Stay and Abeyance of First Amended Petition for Writ of Habeas
10 Corpus" [ECF No. 28]. Respondent argues that Broadnax is not
11 entitled to a stay because he did not submit a mixed petition; the
12 statute of limitations has run; and the new claims do not "relate
13 back" to the timely claims in the pending First Amended Petition.
14 (Opp'n Mot. Stay & Abey 4-6, ECF No. 28.) Petitioner did not file
15 any reply memorandum.

16 As a preliminary matter, the Court must consider whether a
17 motion to stay is a dispositive or nondispositive motion,
18 respectively meriting either a report and recommendation or an
19 order. "Although granting or denying a stay may be an important
20 step in the life of a case . . . a stay order is merely
21 suspensory. Even if such a motion is granted, the court still
22 retains authority to dissolve the stay" PowerShare, Inc.
23 v. Syntel, Inc., 597 F.3d 10, 14 (1st Cir. 2010) (stay pending
24 arbitration). The court in PowerShare concluded that a motion to
25 stay is nondispositive. See id.; see also Apple, Inc. v. Samsung
26 Elecs. Co., Ltd., No. 12-cv-00630-LHK, 2012 WL 2936432, at *1-2
27 (N.D. Cal. July 18, 2012) (noting that a motion to stay
28 preliminary injunction pending appeal was nondispositive); Young

1 v. Cnty. of Hawaii, Civil No. 11-00580 ACK-RLP, 2012 WL 2366016,
2 at *8 n.13 (D. Haw. June 19, 2012) (treating motion to stay
3 pending arbitration as nondispositive); Lovell v. United Airlines,
4 Inc., 728 F. Supp. 2d 1096, 1100 (D. Haw. 2010) (reviewing, as
5 nondispositive, order denying motion to stay pending resolution of
6 an earlier-filed class action); Sylvester v. Menu Foods, Inc., No.
7 07-00409 ACK-KSC, 2007 WL 4291024, at *3 (D. Haw. Dec. 5, 2007)
8 (reviewing order on motion to stay under standard used for
9 dispositive motions because it was "inextricably intertwined" with
10 ruling on motion to remand, which some courts treat as a
11 dispositive motion).

12 Other courts that have considered a motion to stay and abey
13 have resolved the motion with an order. See also Stamps v. Cate,
14 No. 11-cv-2048-LAB (WMC), 2012 WL 3076408, at *4 (S.D. Cal. July
15 30, 2012) (issuing order on habeas petitioner's motion to stay);
16 Chau v. Uribe, No. 11cv136 AJB (PCL), 2011 WL 1544809, at *1 (S.D.
17 Cal. Apr. 19, 2011) (same). But see Gohel v. Ryan, CV-10-0001-
18 PHX-FJM (JRI), 2011 WL 5331716, at *1 (D. Ariz. Sept. 15, 2011)
19 ("Because the resolution of [the motion to stay] would effectively
20 be dispositive of the affected claims [for habeas relief], the
21 undersigned makes the following proposed findings of fact, report,
22 and recommendation"). Figueroa v. Lea, No. 10-CV-2274 MMA
23 (JMA), 2011 WL 4403977, at *5 (S.D. Cal. Aug. 12, 2012)
24 (submitting report and recommendation on motion to stay without
25 discussing whether motion was dispositive); Orozco v. Silva, No.
26 11cv2663-AJB (BLM), 2012 WL 1898793, at *6 (S.D. Cal. Jan. 30,
27 2012) (same).

28

1 In his March 22, 2012 filing, Broadnax first indicated that
2 he intended to bring new claims for habeas relief in state court
3 [ECF No. 8]. Since that time, he has had ample time to do so. In
4 the interim, the fully exhausted claims alleged in his federal
5 Petition remain pending. Exhausting new claims for habeas relief
6 in the state courts is a prerequisite to asserting them in a
7 petition for writ of habeas corpus in the federal courts. See
8 Rhines v. Weber, 544 U.S. 269, 273-74 (2005). Nevertheless, §
9 2254(b)(2) authorizes the Court to deny a claim for habeas relief
10 on the merits although it has not been exhausted. See 28 U.S.C.A.
11 § 2254(b)(2) (West 2006). An order denying a motion to stay a
12 federal petition is qualitatively different from an order
13 dismissing an unexhausted claim on the merits.

14 Broadnax's motion to stay his fully exhausted federal habeas
15 Petition does not dispose of "new" claims he plans to raise in
16 state court. Those claims will proceed. If Petitioner does not
17 obtain relief from the California courts on claims grounded in
18 federal law, he will attempt to amend his federal Petition and
19 pursue the additional claims here. Broadnax's expectation is that
20 he will return to federal court. Thus, a motion to stay and abey
21 is not dispositive of claims that have not been alleged in his
22 federal Petition.

23 A motion to stay in order to exhaust habeas claims in state
24 court should be treated like a motion to remand, which "is more
25 logically viewed as non-dispositive because it does not dispose of
26 a 'claim'" 14 James Wm. Moore et al., Moore's Federal
27 Practice § 72.02[4], at 72-10.1 (3d ed. 2012) (discussing motions
28 to remand). "All of the claims and defenses proceed in state

1 court after remand, and use of a federal forum is neither a claim
2 nor a defense." Id. This Court concludes that motions to stay
3 and abey are nondispositive and will issue an order ruling on
4 Petitioner's motion.

5 The Court finds Broadnax's motion suitable for resolution on
6 the papers. See S.D. Cal. Civ. R. 7.1(d)(1). The Court has
7 reviewed the First Amended Petition, Petitioner's "Notice
8 Regarding an Extension of Time in Which to File Petition for Writ
9 of Habeas Corpus in State Court" ("Motion to Stay"), his Motion
10 for Appointment of Counsel, Cate's Opposition, and the lodgments.
11 For the reasons discussed below, Broadnax's Motion to Stay [ECF
12 No. 8] is **DENIED**.

13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 On December 19, 2008, in the Superior Court of California,
15 County of San Diego, a jury convicted Broadnax of dissuading a
16 witness from testifying, attempted witness intimidation, and two
17 counts of first-degree murder. (Lodgment No. 1, Clerk's Tr. vol.
18 3, 621-27, Dec. 19, 2008.) The jury concluded that Petitioner
19 committed these crimes for the benefit of a criminal street gang;
20 he was a principal in the murders; and he used a firearm causing
21 death. (Id. at 621, 623, 626-27.) They also found that Broadnax
22 was an active participant of a criminal street gang when he
23 committed the murders, which qualified as a special circumstance.
24 (Id. at 622, 624.) On February 19, 2009, Petitioner was sentenced
25 to two life sentences without the possibility of parole plus
26 fifty-seven years to life. (Id. at 560-63, 629.)

27 On October 2, 2009, Broadnax appealed the convictions; they
28 were affirmed by Division One of the California Court of Appeal,

1 Fourth Appellate District, on August 20, 2010. (See Lodgment No.
2 3, Appellant's Opening Brief, People v. Broadnax, No. D054634
3 (Cal. Ct. App. Aug. 20, 2010); Lodgment No. 6, People v. Broadnax,
4 No. D054634, slip op. at 1, 14 (Cal. Ct. App. Aug. 20, 2010).)
5 Broadnax petitioned the California Supreme Court for review on
6 September 30, 2010. (Lodgment No. 7, Petition for Review, People
7 v. Broadnax, No. SD2009701437 (Cal. Dec. 15, 2010).) The
8 California Supreme Court denied the petition without opinion.
9 (Lodgment No. 8, People v. Broadnax, No. S186803, order at 1 (Cal.
10 Dec. 15, 2010.) Petitioner then filed a Petition for Writ of
11 Habeas Corpus in this Court on March 5, 2012 [ECF No. 1], and
12 submitted a First Amended Petition, which was filed nunc pro tunc
13 to May 7, 2012 [ECF No. 16].

14 II. LEGAL STANDARD FOR EXHAUSTION

15 Before a federal court may grant habeas relief on a claim, a
16 petitioner must exhaust all available state judicial remedies. 28
17 U.S.C.A. § 2254(b)(1)(A) (West 2006); Rhines v. Weber, 544 U.S. at
18 273-74 (referring to total exhaustion requirement of Rose v.
19 Lundy, 455 U.S. 509, 522 (1982), abrogated on other grounds by
20 Rhines, 544 U.S. 269). A claim is exhausted only when a
21 petitioner has fairly presented it to the state courts. Duncan v.
22 Henry, 513 U.S. 364, 365 (1995) (citing Picard v. Connor, 404 U.S.
23 270, 275 (1971)). To meet the fair presentation requirement, the
24 petitioner must "alert the state courts to the fact that he [is]
25 asserting a claim under the United States Constitution." Hiivala
26 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing Duncan, 513
27 U.S. at 365-66). The petitioner must "provide the state courts
28 with a 'fair opportunity' to apply controlling legal principles to

1 the facts bearing upon his constitutional claim." Anderson v.
2 Harless, 459 U.S. 4, 6 (1982) (citing Picard, 404 U.S. at 276-77).
3 By giving state courts the "'opportunity to pass upon and correct'
4 alleged violations of its prisoners' federal rights," comity is
5 promoted, and disruption of state judicial proceedings is
6 prevented. Duncan, 513 U.S. at 365 (quoting Picard, 404 U.S. at
7 275); see also Rose, 455 U.S. at 518; Fields v. Waddington, 401
8 F.3d 1018, 1020 (9th Cir. 2005).

9 Constitutional claims raised in federal proceedings must be
10 presented to the state courts first. Baldwin v. Reese, 541 U.S.
11 27, 31-32 (2004). The highest state court must have an
12 opportunity to consider the factual and legal bases of a
13 petitioner's claims before they are presented to the federal
14 court. Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999)
15 (citing Picard, 404 U.S. at 276; Johnson v. Zenon, 88 F.3d 828,
16 829 (9th Cir. 1996)); see also Duncan, 513 U.S. at 365; Scott v.
17 Schriro, 567 F.3d 573, 582 (9th Cir. 2009); Davis v. Silva, 511
18 F.3d 1005, 1008 (9th Cir. 2008). A claim is not exhausted if it
19 is pending before the state's highest court. See Rose, 455 U.S.
20 at 515 ("[A]s a matter of comity, federal courts should not
21 consider a claim in a habeas corpus petition until after the state
22 courts have had an opportunity to act"); Anderson v.
23 Morrow, 371 F.3d 1027, 1036 (9th Cir. 2004) ("AEDPA's exhaustion
24 requirement entitles a state to pass on a prisoner's federal
25 claims before the federal courts do so."). "It follows, of
26 course, that once the federal claim has been fairly presented to
27 the state courts, the exhaustion requirement is satisfied."
28 Picard, 404 U.S. at 275.

1 Courts may deny an application for habeas relief on the
2 merits even if the petitioner has not yet exhausted his state
3 judicial remedies. 28 U.S.C.A. § 2254(b)(2). But courts have no
4 authority to grant relief on unexhausted claims. Id. §
5 2254(b)(1)(A).

6 III. DISCUSSION

7 A. Whether the First Amended Petition is a Mixed Petition

8 Respondent Cate argues that the claims in the First Amended
9 Petition have all been exhausted, and therefore the Petition is
10 not mixed. (Opp'n Mot. Stay & Abey 4, ECF No. 28.) According to
11 Cate, the Rhines test for determining whether a court should stay
12 a mixed petition is therefore inapplicable. (Id.) Moreover,
13 Respondent contends that even if Broadnax's Amended Petition is
14 mixed, he has not shown good cause for his failure to have
15 previously exhausted his new claims or that those claims are
16 meritorious, as required by Rhines. (Id. at 4-5.)

17 Cate maintains that Broadnax's First Amended Petition is not
18 mixed, and thus the applicable test is that described in Kelly v.
19 Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds
20 by Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007). (Id. at
21 5.) Respondent insists that Petitioner is not entitled to a stay
22 because Kelly requires the petitioner to amend his petition to add
23 the new claims within the original one-year statute of limitations
24 set forth by AEDPA, and Broadnax has not yet filed anything in
25 state court relating to his new claims. (Id.)

26 A mixed petition contains both exhausted and unexhausted
27 claims. See Rose, 455 U.S. at 510. In Rhines v. Weber, 544 U.S.
28 269, the Supreme Court held that district courts have the

1 discretion to stay a mixed habeas petition and hold it in abeyance
2 to allow a petitioner to present unexhausted claims to state
3 courts. "Once the petitioner exhausts his state remedies, the
4 district court will lift the stay and allow the petitioner to
5 proceed in federal court." Id. at 275-76.

6 In his pending First Amended Petition, Broadnax argues that
7 he is entitled to relief based on inadequate jury instructions,
8 the denial of his motion for a new trial, insufficiency of the
9 evidence, and alternatively, the trial court's omission of an
10 element of the charge for dissuading a witness. (First Am. Pet.
11 6-7, 27-28, 38-39, 44, ECF No. 16.) These claims were raised
12 before, and rejected by, the California Supreme Court. (See
13 Lodgment No. 7, Petition for Review, People v. Broadnax, No.
14 SD2009701437; Lodgment No. 8, People v. Broadnax, No. S186803,
15 order at 1.) All the claims contained in Broadnax's Petition are
16 fully exhausted, so the Petition is not mixed. See Rose, 455 U.S.
17 at 510 (stating that mixed petitions contain both exhausted and
18 unexhausted claims). Rhines is not applicable to Petitioner's
19 case. See Sims v. Calipatria State Prison, No. CV 10-715-DSF
20 (AGR), 2012 U.S. Dist. LEXIS 69931, at *4 (C.D. Cal. Feb. 29,
21 2012) (noting that Rhines does not apply to a fully exhausted
22 petition).

23 **B. Whether a Stay of Broadnax's Fully Exhausted Petition is**
24 **Warranted**

25 To date, the Ninth Circuit has only applied the Kelly
26 procedure to requests to stay mixed petitions. See King v. Ryan,
27 564 F.3d 1133, 1140 (9th Cir. 2009). Courts have the discretion
28 "to stay and hold in abeyance the amended, fully exhausted

1 petition, providing the petitioner the opportunity to proceed to
2 state court to exhaust the deleted [unexhausted] claims . . ."
3 King, 564 F.3d at 1139. Since Rhines, district courts have
4 continued to apply the Kelly procedure to requests to stay fully
5 exhausted petitions, even when the petition was never a mixed
6 petition. See Sims, 2012 U.S. Dist. LEXIS 69931, at *4-5 (finding
7 Kelly procedure is the appropriate standard to stay a fully
8 exhausted petition while a petitioner attempts to exhaust
9 additional claims); Hughes v. Walker, No. 2:10-cv-3024 WBS TJB,
10 2012 U.S. Dist. LEXIS 11844, at *12-13 (E.D. Cal. Feb. 1, 2012)
11 (finding Kelly is the "relevant procedure" when a petitioner seeks
12 to stay original claims in a fully exhausted petition, while he
13 seeks to exhaust new claims); Conriquez v. Uribe, No. 1:09-cv-
14 01003-SKO-HC, 2012 U.S. Dist. LEXIS 607, at *9 (E.D. Cal. Jan. 4,
15 2012) (applying Kelly); Knox v. Martel, No. CIV S-08-0494-MCE-CMK-
16 P, 2010 U.S. Dist. LEXIS 30967, at *2 (E.D. Cal. Mar. 31, 2010)
17 (citing Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005)
18 (applying Kelly)). Therefore, Broadnax can request a stay under
19 Kelly while he attempts to exhaust new claims.

20 In Jackson, the Ninth Circuit reaffirmed the three-step
21 procedure outlined in Kelly. Jackson, 425 F.3d at 659.

22 The procedure include[s] (1) allowing a petitioner to
23 amend his petition to remove the unexhausted claims --
24 as Rose indicated; (2) staying and holding in abeyance
25 the amended, fully exhausted petition to allow a
26 petitioner the opportunity to proceed to state court to
exhaust the deleted claims; and (3) permitting the
petitioner after completing exhaustion to amend his
petition once more to reinsert the newly exhausted
claims back into the original petition.

27 Id. at 658-59 (citation omitted). The Ninth Circuit has
28 determined that the Kelly procedure does not undermine AEDPA

1 because a petitioner may amend his petition only if the claims are
2 still timely or relate back to the original pleading. See King,
3 564 F.3d at 1140-41.

4 A Kelly stay is appropriate when an outright dismissal will
5 make it difficult for the petitioner to return to district court
6 within AEDPA's one-year statute of limitation period. See Sims,
7 2012 U.S. Dist. LEXIS 69931, at *3-5. "A petitioner seeking to
8 use the Kelly procedure will be able to amend his unexhausted
9 claims back into his federal petition once he has exhausted them
10 only if those claims are determined to be timely. And
11 demonstrating timeliness will often be problematic under the now-
12 applicable legal principles." King, 564 F.3d at 1140-41.
13 Therefore, Broadnax will only be entitled to a stay of his fully
14 exhausted Petition if his new ineffective assistance of counsel
15 and prosecutorial misconduct claims are not otherwise time barred
16 by AEDPA.

17 **1. Statute of limitations**

18 Respondent contends that the claims Broadnax is seeking to
19 exhaust are untimely. (Opp'n Mot. Stay & Abey 5-6, ECF No. 28.)
20 Cate asserts that AEDPA's statute of limitations expired on March
21 15, 2012, because the one-year statute of limitations began on
22 March 15, 2011 -- ninety days after the December 15, 2010
23 California Supreme Court decision. (Id. at 5.) Petitioner filed
24 his Petition in federal court on March 5, 2012. (Id. at 5-6.)
25 Respondent also claims that filing a habeas claim in federal court
26 does not toll AEDPA's statute of limitations, and to date,
27 Broadnax has still not returned to state court to exhaust his new
28

1 claims. (Id. at 6.) Broadnax does not address whether the
2 statute of limitations for his new claims has expired.

3 A petitioner seeking to use the Kelly procedure and amend his
4 petition must demonstrate that the unexhausted claims are timely.
5 King, 564 F.3d at 1140-41. Broadnax's Petition is subject to the
6 Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996
7 because it was filed after April 24, 1996. 28 U.S.C.A. § 2244
8 (West 2006); Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing
9 Lindh v. Murphy, 521 U.S. 320, 326 (1997)). All federal habeas
10 petitions are subject to AEDPA's one-year statute of limitations.
11 As amended, § 2244(d) provides:

12 (1) A 1-year period of limitation shall apply to an
13 application for a writ of habeas corpus by a person in
14 custody pursuant to the judgment of a State court. The
15 limitation period shall run from the latest of --

16 (A) the date on which the judgment became final by
17 the conclusion of direct review or the expiration
18 of the time for seeking such review;

19 (B) the date on which the impediment to filing an
20 application created by State action in violation of
21 the Constitution or laws of the United States is
22 removed, if the applicant was prevented from filing
23 by such State action;

24 (C) the date on which the constitutional right
25 asserted was initially recognized by the Supreme
26 Court, if the right has been newly recognized by
27 the Supreme Court and made retroactively applicable
28 to cases on collateral review; or

(D) the date on which the factual predicate of the
claim or claims presented could have been
discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1).

26 On August 20, 2010, the California Court of Appeal issued its
27 opinion addressing Petitioner's appeal from the judgment of
28 conviction. (Lodgment No. 6, People v. Broadnax, No. D054634,

1 slip op. at 1.) The court affirmed the superior court judgment.
2 (Id. at 1, 14.) Broadnax filed a petition for review, which the
3 California Supreme Court denied on December 15, 2010. (See
4 Lodgment No. 8, People v. Broadnax, No. S186803, order at 1.)
5 Broadnax did not file a petition for a writ of certiorari with the
6 United States Supreme Court.

7 United States Supreme Court Rule 13 provides that a petition
8 for certiorari must be filed within ninety days of the entry of an
9 order denying discretionary review by the state supreme court.
10 See S. Ct. R. 13. When a habeas petitioner seeks discretionary
11 review by the state's highest court but does not file a petition
12 with the United States Supreme Court, the judgment becomes final
13 when the prisoner's time to petition the Supreme Court expires.
14 See Gonzalez v. Thaler, __ U.S. __, __, 132 S. Ct. 641, 653-54
15 (2012).

16 Broadnax's judgment became final for the purposes of AEDPA on
17 March 15, 2011, ninety days after the California Supreme Court
18 denied his petition for review. See id.; see also S. Ct. R. 13.
19 Pursuant to § 2244(d), the statute of limitations for federal
20 habeas corpus began to run on March 16, 2011, the day after the
21 judgment became final. 28 U.S.C.A. § 2244(d)(1)(A); see Corjasso
22 v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (explaining that the
23 one-year statute of limitations under AEDPA begins to run the day
24 after the conviction becomes final). The statute of limitations
25 period would therefore have expired on March 15, 2012. See
26 Patterson v. Stewart, 251 F.3d 1243, 1245-46 (9th Cir. 2001)
27 (quoting Fed. R. Civ. P. 6(a)) ("In computing any period of time
28 prescribed or allowed . . . by any applicable statute, the day of

1 the act, event, or default from which the designated period of
2 time runs shall not be included.")

3 Broadnax signed his "Notice Regarding an Extension of Time in
4 Which to File Petition For Writ of Habeas Corpus in State Court"
5 on March 19, 2012 [ECF No. 8], seeking to stay the First Amended
6 Petition while he raises new claims in state court. To date,
7 Petitioner has not provided any evidence showing that he has filed
8 a state habeas corpus petition related to these new claims. On
9 the contrary, his motion for a stay suggests that he has yet to
10 file anything in state court. (See Notice Regarding Extension
11 Time 1, ECF No. 8.) (requesting time to research, write, and file
12 state habeas corpus petition).

13 A federal petition for writ of habeas corpus may be dismissed
14 with prejudice when it was not filed within AEDPA's one-year
15 statute of limitations. Jiminez v. Rice, 276 F.3d 478, 483 (9th
16 Cir. 2001). The statute of limitations is a threshold issue that
17 must be resolved before the merits of individual claims. White v.
18 Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002). Nevertheless, an
19 otherwise late petition may be timely if Broadnax can show he is
20 entitled to statutory or equitable tolling, or that an amended
21 petition that includes newly exhausted ineffective assistance of
22 counsel and prosecutorial misconduct claims will relate back to
23 his original claims for habeas relief.

24 **a. Statutory tolling**

25 Respondent argues that Petitioner is not entitled to tolling
26 because the time in federal court does not toll AEDPA's statutory
27 clock. (Opp'n Mot. Stay & Abey 6, ECF No. 28.) Cate maintains
28 that Broadnax's new ineffective assistance of counsel and

1 prosecutorial misconduct claims are time barred because AEDPA's
2 statute of limitations expired on March 15, 2012. (Id.)

3 Petitioner does not address whether statutory tolling applies.

4 The statute of limitations under AEDPA is tolled during
5 periods in which a "properly filed" habeas corpus petition is
6 "pending" in the state court. 28 U.S.C.A. § 2244(d)(2). The
7 statute specifically provides, "The time during which a properly
8 filed application for State post-conviction or other collateral
9 review with respect to the pertinent judgment or claim is pending
10 shall not be counted toward any period of limitation under this
11 subsection." Id.; see also Pace v. DiGuglielmo, 544 U.S. 408, 410
12 (2005). "[A]n application is 'properly filed' when its delivery
13 and acceptance are in compliance with the applicable laws and
14 rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000)
15 (explaining that typical filing requirements include all relevant
16 time limits).

17 The interval between the disposition of one state petition
18 and the filing of another may be tolled under "interval tolling."
19 Carey v. Saffold, 536 U.S. 214, 223 (2002). "[T]he AEDPA statute
20 of limitations is tolled for 'all of the time during which a state
21 prisoner is attempting, through proper use of state court
22 procedures, to exhaust state court remedies with regard to a
23 particular post-conviction application.'" Nino v. Galaza, 183
24 F.3d 1003, 1006 (9th Cir. 1999) (quoting Barnett v. Lamaster, 167
25 F.3d 1321, 1323 (10th Cir. 1999)); see also Carey, 536 U.S. at
26 219-22. The statute of limitations is tolled from the time the
27 first state habeas petition is filed until state collateral review
28 is concluded, but it is not tolled before the first state

1 collateral challenge is filed. Thorson v. Palmer, 479 F.3d 643,
2 646 (9th Cir. 2007) (citing Nino, 183 F.3d at 1006).

3 Here, Broadnax has yet to file a state habeas corpus petition
4 related to his new ineffective assistance of counsel or
5 prosecutorial misconduct claims. These claims are not statutorily
6 tolled while his First Amended Petition asserting entirely
7 different, exhausted causes of action is pending in federal court.
8 See Duncan v. Walker, 533 U.S. 167, 182 (2001) (stating that
9 AEDPA's statute of limitations is not tolled "during the pendency
10 of [a] . . . federal habeas petition."). Furthermore, Broadnax
11 cannot avail himself of statutory tolling while he exhausts his
12 additional state claims because Petitioner did not timely file his
13 claims in state court, and AEDPA's statute of limitations was not
14 tolled before it expired. See Pace, 544 U.S. at 410 (holding that
15 untimely state post-conviction petition is not "properly filed"
16 within the meaning of § 2244(d)(2)).

17 **b. Equitable tolling**

18 Neither the Petitioner nor the Respondent addresses whether
19 equitable tolling applies. Equitable tolling of the statute of
20 limitations is appropriate when the petitioner can show "(1) that
21 he has been pursuing his rights diligently, and (2) that some
22 extraordinary circumstance stood in his way." Holland v. Florida,
23 560 U.S. __, __, 130 S. Ct. 2549, 2562 (2010); Pace, 544 U.S. at
24 418; see also Lawrence v. Florida, 549 U.S. 327, 335 (2007). The
25 petitioner bears the burden of establishing the elements. Roberts
26 v. Marshall, 627 F.3d 768, 771 (9th Cir. 2010). A petitioner is
27 entitled to equitable tolling of AEDPA's one-year statute of
28 limitations where "'extraordinary circumstances beyond a

1 prisoner's control make it impossible'" to file a timely petition.
2 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (quoting
3 Brambles v. Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)).

4 "'[T]he threshold necessary to trigger equitable tolling
5 [under AEDPA] is very high, lest the exceptions swallow the
6 rule.'" Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002)
7 (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir.
8 2000). The failure to file a timely petition must be the result
9 of external forces, not the result of the petitioner's lack of
10 diligence. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
11 "Determining whether equitable tolling is warranted is a
12 'fact-specific inquiry.'" Spitsyn, 345 F.3d at 799 (quoting Frye
13 v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)). If a petitioner
14 makes a "'good-faith allegation that would, if true, entitle him
15 to equitable tolling[,]" the petitioner should receive an
16 evidentiary hearing. Roy v. Lampert, 465 F.3d 964, 969 (9th Cir.
17 2006) (alteration in original) (quoting Laws v. LaMarque, 351 F.3d
18 919, 921 (9th Cir. 2003)).

19 Broadnax does not allege that he is entitled to equitable
20 tolling. (See generally Notice Regarding Extension Time 1, ECF
21 No. 8.) There is no indication that he has diligently pursued the
22 ineffective assistance of counsel and prosecutorial misconduct
23 claims that arose prior to filing his federal Petition for Writ of
24 Habeas Corpus. See Holland, 560 U.S. at ___, 130 S. Ct. at 2562;
25 (see also Lodgment No. 3, Appellant's Opening Brief, People v.
26 Broadnax, No. D054634; Lodgment No. 7, Petition for Review, People
27 v. Broadnax, No. SD2009701437.)

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1 Additionally, Petitioner has not filed the claims in state
2 court, even though more than seven months have elapsed since
3 AEDPA's one-year statute of limitations expired on March 15, 2012.
4 (See Opp'n Mot. Stay & Abey 5, ECF No. 28; see also Pinks v.
5 Gipson, No. CV 12-1306 RGK (JCG), 2012 WL 1044310, at *1 (C.D.
6 Cal. Mar. 28, 2012) (finding a prisoner who filed a state petition
7 for writ of habeas corpus six months late was not diligently
8 pursuing his claims). Neither Broadnax nor his appellate counsel
9 questioned the trial attorney's actions while appealing the
10 conviction. During the period after the California Supreme Court
11 denied his petition for review and prior to filing his federal
12 habeas Petition, Broadnax failed to consider the claim of
13 prosecutorial misconduct. See Doe v. Busby, 661 F.3d 1001, 1012-
14 15 (9th Cir. 2011) (discussing what is reasonable diligence when
15 faced with attorney misconduct). Petitioner has not demonstrated
16 that he was reasonably diligent in pursuing his new ineffective
17 assistance of counsel and prosecutorial misconduct claims. See
18 Holland, 560 U.S. at __, 130 S. Ct. at 2562.

19 **2. Relation back**

20 Cate contends that Broadnax's untimely new claims "do not
21 appear to be related" to the claims presented in his First Amended
22 Petition. (Opp'n Mot. Stay & Abey 6, ECF No. 28.) Petitioner
23 does not address the issue.

24 The Federal Rules of Civil Procedure apply to federal habeas
25 cases through Federal Rule of Civil Procedure 81(a)(4), 28 U.S.C.
26 § 2242, and Habeas Corpus Rule 12. See 28 U.S.C.A. § 2242 (West
27 2012); Rules Governing § 2254 Cases, Rule 12, 28 U.S.C. foll. §
28 2254; Fed. R. Civ. P. 81(a)(4). "Amendments made after the

1 statute of limitations has run relate back to the date of the
2 original pleading if the original and amended pleadings '[arise]
3 out of the conduct, transaction, or occurrence." Mayle v. Felix,
4 545 U.S. 644, 655 (2005) (citing Fed. R. Civ. P. 15(c)(2)). The
5 applicable test is whether the claim arises out of a "common 'core
6 of operative facts' uniting the original and newly asserted
7 claims." Id. at 659 (citations omitted).

8 A claim does not arise out of a common core of operative
9 facts when the claim is "'supported by facts that differ in both
10 time and type from those the original pleading set forth.'" Schneider v. McDaniel, 674 F.3d 1144, 1150 (9th Cir. 2012) (citing
11 Mayle, 545 U.S. at 650). "If the newly exhausted claim is not
12 timely under the AEDPA or the relation-back doctrine does not
13 apply, it may not be added to the existing petition and a stay is
14 inappropriate." Garcia v. Evans, No. 1:08-cv-1819 AWI DLB HC,
15 2012 U.S. Dist. LEXIS 3620, at *6-7 (E.D. Cal. Jan. 6, 2012).

17 **a. Prosecutorial misconduct claim**

18 First, the Court will consider whether Broadnax's new claim,
19 which he describes as "PROSECUTORIAL MISCONDUCT: FAILURE TO
20 DISCLOSE BRADY[] (EXCULPATORY) MATERIAL," relates back to any of
21 the three claims in the First Amended Petition. (See Mot. & Decl.
22 Appointment Counsel 1, ECF No. 20.) Petitioner does not
23 articulate the factual basis of this new claim, other than by
24 vaguely asserting that it is based on Brady violations. (See
25 Notice Regarding Extension Time 1, ECF No. 8; see generally Mot. &
26 Decl. Appointment Counsel 1, ECF No. 20.) He also does not
27 address whether this new claim relates back to any of his initial
28

1 claims. (See generally Notice Regarding Extension Time 1, ECF No.
2 8.)

3 Absent an explanation of its factual basis, the Court cannot
4 conclude that this claim shares a common core of operative facts
5 with any of the initial claims. See Mayle, 545 U.S. at 659.
6 Further, from the very limited information that was provided to
7 the Court, grounds one and three in the First Amended Petition
8 appear wholly unrelated to any purported prosecutorial misconduct
9 resulting in a violation of Brady v. Maryland, 373 U.S. 83 (1963).
10 (See First. Am. Pet. 6-7, 38-39, 44, ECF No. 16.) The timing and
11 type of facts relevant to an alleged error committed by the court
12 in instructing the jury differ significantly from those relevant
13 to prosecutorial misconduct. See Schneider, 674 F.3d at 1150;
14 Hernandez v. California, No. C 08-4085 SI (pr), 2010 WL 1854416,
15 at *4 (N.D. Cal. May 6, 2010) (holding that new prosecutorial
16 misconduct claim did not relate back to sufficiency of the
17 evidence or instructional error claims in the original petition);
18 Nordlof v. Clark, No. C 07-4899 MMC (PR), 2010 WL 761294, at *7-9
19 (N.D. Cal. Mar. 3, 2010) (holding that eight new claims of
20 prosecutorial misconduct did not relate back to other claims,
21 including the prosecution's alleged suppression of favorable
22 evidence).

23 The same is true for ground three, which concerns the
24 sufficiency of the evidence supporting Petitioner's conviction for
25 dissuading a witness. See Sua v. Tilton, No. 07cv1338-JM (BLM),
26 2010 WL 4569917, at *4, *8 (S.D. Cal. Aug. 4, 2010) (holding that
27 new prosecutorial misconduct claim did not relate back to
28 sufficiency of the evidence claim in the original petition);

1 Hernandez, 2010 WL 1854416, at *4 (same); Nordlof, 2010 WL 761294,
2 at *7-9 (same).

3 The claim in ground two regarding the trial court's alleged
4 error in denying Broadnax's motion for a new trial, however, may
5 be factually related to a claim of prosecutorial misconduct. In
6 his amended motion for a new trial, Broadnax hints at a possible
7 prosecutorial misconduct claim regarding the prosecution's
8 purported withholding of a letter written by a key prosecution
9 witness. (See Lodgment No. 1, Clerk's Tr. vol. 3, 508-09.)
10 Petitioner argued that the letter bore on the credibility of that
11 witness but was not discovered by defense counsel until after
12 trial. (Id.) On this basis, Broadnax filed a motion for a new
13 trial. (Id. at 507-13.) In the motion, Petitioner stated that
14 "[g]iven the close scrutiny of this prized and protected witness
15 . . . Defense Counsel finds it strange that the December 8th
16 letter was not intercepted by the . . . District Attorney
17 Investigators having mail watches on [the witness] available by at
18 least Monday December 15th." (Id. at 509.)

19 Indeed, prosecutorial misconduct based on Brady violations
20 may be the basis for a motion for a new trial. See United States
21 v. Palivos, 486 F.3d 250, 255 (7th Cir. 2007) (explaining what a
22 defendant must establish to obtain a new trial based on Brady).
23 Yet, it appears that Broadnax is unsure of the factual basis for
24 his prosecutorial misconduct claim. (See Notice Regarding
25 Extension Time 1, ECF No. 8.) (requesting a stay in order to
26 research and identify issues for state habeas corpus petition).
27 Accordingly, Petitioner has not established that his prosecutorial
28 misconduct claim relates back to any of his initial claims.

1 **b. Ineffective assistance of counsel claim**

2 Next, the Court will consider whether Petitioner's new claim
3 of "INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO INVESTIGATE
4 NEWLY DISCOVERED EVIDENCE" relates back to claims in the First
5 Amended Petition. (See Mot. & Decl. Appointment Counsel 1, ECF
6 No. 20.) Again, Broadnax does not provide the factual basis for
7 this new claim, nor does he otherwise allege that it is factually
8 related to any of the claims in his First Amended Petition. (See
9 generally id.; Notice Regarding Extension Time 1, ECF No. 8.)
10 Moreover, grounds one and three in the pending Petition appear to
11 be based on an entirely different set of facts. See De Leon v.
12 Allison, No. 1:11-cv-00945-JLT, 2012 WL 3778836, at *4-6 (E.D.
13 Cal. Aug. 30, 2012) (holding that new ineffective assistance of
14 counsel claim did not relate back to either the instructional
15 error or sufficiency of the evidence claims in the original
16 petition); Hernandez, 2010 WL 1854416, at *4 (same); Nordlof, 2010
17 WL 761294, at *8-9 (same).

18 As to Broadnax's pending claim that his motion for a new
19 trial was wrongly denied, ground two, both this claim and his
20 ineffective assistance of counsel claim relate to "newly
21 discovered evidence." (Compare First Am. Pet. 27-28, ECF No. 16,
22 with Mot. & Decl. Appointment Counsel 1, ECF No. 20.) Petitioner
23 does not state what "newly discovered evidence" forms the basis of
24 his ineffective assistance of counsel claim. Consequently,
25 Broadnax has failed to establish that his ineffective assistance
26 of counsel or prosecutorial misconduct claims relate back to any
27 of the claims in the First Amended Petition.

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IV. CONCLUSION

Broadnax's First Amended Petition is not a mixed petition, and Rhines does not address whether he is entitled to stay his fully exhausted Petition while he exhausts his new claims. Additionally, AEDPA's statute of limitations has expired, and Petitioner has not sufficiently alleged that he is entitled to statutory or equitable tolling, or that the relation back doctrine applies to his new claims. As a result, he is not entitled to a stay under Kelly. Therefore, the Motion, which he titled, "Notice Regarding an Extension of Time in Which to File Petition for Writ of Habeas Corpus in State Court" [ECF No. 8] is **DENIED**.

IT IS SO ORDERED.

DATED: October 26, 2012


Ruben B. Brooks, Magistrate Judge
United States District Court

cc:
Judge Curiel
All Parties of Record