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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>GEORGE BERARDI, Petitioner, v. DANIEL PARAMO, Respondent.</p>	<p>) Case No. 13cv1598-BTM (BLM))) REPORT AND RECOMMENDATION FOR) ORDER DENYING PETITIONER'S) MOTION FOR STAY AND ABEYANCE) PURSUANT TO <i>RHINES</i>, BUT GRANTING) A STAY PURSUANT TO <i>KELLY</i>) [ECF No. 4]</p>
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This Report and Recommendation is submitted to United States District Judge Barry T. Moskowitz pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. Currently before the Court is a motion to stay and abey federal proceedings while Petitioner George Berardi, a state prisoner, exhausts his claims in state court. ECF No. 4.

On July 9, 2013, Petitioner filed a Petition for Writ of Habeas Corpus. ECF No. 1 ("Pet."). On July 12, 2013, Petitioner filed a Motion to Stay and Abey to exhaust a potentially dispositive issue in state court. ECF No. 4 ("Mot. Stay"). Pursuant to the Court's briefing schedule, Respondent timely filed his opposition to Petitioner's motion on August 9, 2013. ECF No. 7-1 ("Opp'n"). After requesting an extension of time, Petitioner timely filed his reply on September 2, 2013. ECF No. 11 ("Reply").

1 The Court has considered the above documents as well as the record as a whole. Based
2 thereon, and for the reasons set forth below, the Court **RECOMMENDS** that Petitioner’s Motion
3 for Stay and Abeyance be **GRANTED IN PART AND DENIED IN PART**.

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 Petitioner began federal habeas proceedings on July 9, 2013 when he filed his Petition for
6 Writ of Habeas Corpus. Pet. Petitioner filed the currently-operative First Amended Petition on
7 July 15, 2013. ECF No. 6 (“FAP”). In his petition, Petitioner claims that his constitutional rights
8 were violated when the trial court denied his motion for a new trial due to juror misconduct and
9 when he received ineffective assistance of counsel from his appellate attorney who failed to brief
10 the issue of Petitioner's trial attorney's "refusal to allow Petitioner to testify and the use of the
11 trial judge of the wrong standard to assess prejudice." FAP at 22. Petitioner notes that the juror
12 misconduct claim "has been fully exhausted," but that the ineffective assistance of counsel "claim
13 is unexhausted and is pending in the state Supreme Court." Id. at 3-5.

14 On July 12, 2013, Petitioner filed a motion to stay. Mot. Stay. In his motion to stay,
15 Petitioner asks the Court to hold his FAP in abeyance while he exhausts his ineffective assistance
16 of counsel claim in state court. Id. at 2. In support, Petitioner contends that "a stay is proper
17 because the claim Petitioner is litigating in state court is potentially meritorious and because
18 there is good cause" and because "[a] successful resolution of any of this claim in state court will
19 render moot further proceedings on this petition." Id. at 2-3. Respondent contends that
20 Petitioner is not entitled to a stay pursuant to Rhines because he has not established good cause
21 for his failure to exhaust his state court remedies, but that the “Court may grant [Petitioner’s]
22 stay pursuant to Kelly.” Opp’n. at 6.

23 **DISCUSSION**

24 **I. LEGAL STANDARD**

25 A federal court may not consider a petition for habeas corpus unless the petitioner first
26 has presented his claims to the state courts, thereby “exhausting” them. 28 U.S.C.A.
27 §2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 522 (1982). The exhaustion requirement is
28 founded on federal-state comity, as only when the state court has been presented with the claim

1 may it “pass upon and correct alleged violations of its prisoners’ federal rights.” Duncan v.
2 Henry, 513 U.S. 364, 365 (1995) (per curiam) (quotes and citations omitted). Thus, exhaustion
3 of a habeas petitioner’s federal claims requires that they have been “fairly present[ed]” in each
4 appropriate state court, including a state supreme court with powers of discretionary review.
5 Baldwin v. Reese, 541 U.S. 27, 29 (2004). In California, this generally entails direct or collateral
6 presentation to both the lower courts of appeal and the state supreme court, though
7 presentation to the state supreme court alone may suffice. Rieger v. Christensen, 789 F.2d
8 1425, 1427 (9th Cir. 1986); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). However,
9 claims are not exhausted by mere presentation to the state appellate system. A petitioner must
10 also “alert[] [the state] court to the federal nature of the claim.” Baldwin, 541 U.S. at 29. A
11 petitioner may indicate a federal claim by citing the source of federal law upon which he relies,
12 or by merely labeling the claim as “federal.” Id. at 32.

13 Claims articulated in a federal habeas petition also must be the “substantial equivalent”
14 of those previously presented to the state courts. Pappageorge v. Summer, 688 F.2d 1294, 1295
15 (9th Cir. 1982); Vasquez v. Hillery, 474 U.S. 254, 258 (1986) (a petitioner must “present [] the
16 substance of his claim to the state courts”). The requirement of substantial equivalency is not
17 rigid, and the state habeas petition may be exhausted even when it does not spell out each
18 syllable of the federal claim. Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) (vacated and
19 remanded on other grounds, 528 U.S. 1122 (2000)). Additionally, arguments presented to the
20 federal court may be supplemented with evidence not provided to the state court, so long as the
21 additional information does not “fundamentally alter” the claim. Vasquez, 474 U.S. at 260.

22 If state remedies have not been exhausted as to any of the federal claims, the habeas
23 petition typically should be dismissed. Castille v. Peoples, 489 U.S. 346, 349 (1989); Rose, 455
24 U.S. at 522 (requiring dismissal of petitions that contain both exhausted and unexhausted claims,
25 commonly referred to as “mixed petitions”); see also Rhines v. Weber, 544 U.S. 269, 274-78
26 (2005) (confirming continued applicability of “total exhaustion” rule even after AEDPA imposed
27 one-year statute of limitations on habeas claims).

28

1 Pursuant to the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), all federal
2 habeas petitions are subject to a one-year statute of limitations, and claims not exhausted and
3 presented to the federal court within the one-year period are forfeited. 28 U.S.C. § 2244(d).
4 Generally a court may not consider a “mixed” habeas petition, that is a petition that contains or
5 seeks to present both exhausted and unexhausted claims. Rose, 455 U.S. at 522. If a petitioner
6 presents a mixed petition, the petitioner may seek to stay the exhausted claims while he pursues
7 the unexhausted claims in state court. Rhines, 544 U.S. at 278. Case law has established two
8 alternative procedures for seeking and obtaining a stay, which are set forth in Rhines and Kelly
9 v. Small, 315 F.3d 1063 (9th Cir. 2003), *overruled on other grounds by* Robbins v. Carey, 481
10 F. 3d 1143 (9th Cir. 2007). *See* King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009).

11 Under Rhines, a district court has discretion to stay a mixed petition to allow a petitioner
12 time to return to state court to present the unexhausted claims. Rhines, 544 U.S. at 276. This
13 stay and abeyance is available only in limited circumstances, and only when: (1) there is "good
14 cause" for the failure to exhaust; (2) the unexhausted claims are potentially meritorious; and
15 (3) the petitioner did not intentionally engage in dilatory litigation tactics. Id. at 277-78.

16 A Kelly abeyance requires compliance with the following three-step procedure: (1)
17 petitioner files an amended petition deleting his unexhausted claims; (2) the district court “stays
18 and holds in abeyance the amended, fully exhausted petition, allowing petitioner the opportunity
19 to proceed to state court to exhaust the deleted claims”; and (3) petitioner must subsequently
20 seek to amend the federal habeas petition to reattach “the newly-exhausted claims to the original
21 petition.” King, 564 F.3d at 1135. However, the petitioner only is allowed to amend his
22 newly-exhausted claims back into his federal petition if the claims are timely under the AEDPA
23 or “relate back” to the exhausted claims in the pending petition. Id. at 1140-41, *see also* Mayle
24 v. Felix, 545 U.S. 644, 662-664 (2005). A new claim relates back to an existing claim if the two
25 claims share a “common core of operative facts.” Mayle, 545 U.S. at 646. A new claim does not
26 "relate back" to an existing claim simply because it arises from "the same trial, conviction or
27 sentence." Id. If the newly-exhausted claim is not timely under the AEDPA or the relation-back
28 doctrine, it may not be added to the existing petition. Haskins v. Schriro, 2009 WL 3241836, * 3

1 (D. Ariz. Sept. 30, 2009). If amendment is futile, a stay is inappropriate. Id. at *7.

2 **II. GOOD CAUSE UNDER RHINES**

3 Petitioner argues that a stay is proper under Rhines. Mot. Stay at 4. In support,
4 Petitioner argues that since his unexhausted claim is a federal constitutional claim that could lead
5 to relief in federal court, a stay is proper under Rhines as long as there is good cause which
6 exists here. Id. at 5. Specifically, Petitioner states that since (1) there have been no “abusive
7 litigation tactics or intentional delay or intentionally dilatory litigations tactics,” (2) he has already
8 filed his state court habeas petition, and (3) Petitioner’s “one-year statute will have expired in
9 the next few hours left in the court day before petitioner can notify the federal court of the fact
10 the claim has been exhausted,” good cause has been shown and a stay is proper. Id. at 6-7
11 (internal citations omitted).

12 Respondent contends that Petitioner should not be granted a stay pursuant to Rhines “as
13 he has failed to demonstrate good cause for his failure to exhaust his state remedies before filing
14 his federal Petition.” Opp’n at 5-6. Respondent notes that the only reason given by Petitioner
15 for his failure to fully exhaust his claims is that counsel “did not get this case until two months
16 ago” and contends that Petitioner, who sought a new trial because of his counsel’s ineffective-
17 ness for failing to have him testify and who testified in a hearing on the matter, was aware of
18 his unexhausted claim at the time of trial and should have presented the claim to the California
19 Supreme Court. Id. at 8-9. Respondent also argues that the FAP could be dismissed because
20 it was signed by Petitioner’s counsel, “but not signed and verified by [Petitioner] as required by
21 Rule 2 of the Rules Governing Section § 2254 Cases and 28 U.S.C. 2242.” Id. at 6. Finally,
22 Respondent argues that Petitioner “qualifies for a stay pursuant to *Kelly*,” but that Petitioner’s
23 claim would still be subject to procedural default in state court which may “bar subsequent
24 federal habeas review of the claim.” Id. at 12.

25 In response, Petitioner reiterates that there is good cause for a stay under Rhines because
26 he is arguing that “his appointed attorney . . . interfered with his ability to present his petition
27 to the state courts” which “may support a finding of cause excusing procedural default.” Reply
28 at 2. Petitioner further explains that “[P]etitioner contends that counsel interfered with his overt

1 efforts to ensure that certain claims were raised on appeal by totally disregarding [P]etitioner's
2 request" which in turn, "interfered with [P]etitioner's efforts to put his case before state courts
3 and have the issues federalized for possible federal habeas corpus" constituting good cause
4 under Rhines. Id. at 3.

5 Petitioner has failed to establish good cause for a stay pursuant to Rhines. Stay and
6 abeyance pending exhaustion of claims in state court is only available in "limited circumstances"
7 where the petitioner shows good cause for his failure to previously exhaust. Rhines, 544 U.S.
8 at 277. The paramount concern in considering a motion to stay is adherence to AEDPA's twin
9 objectives of encouraging petitioners to "seek relief from state courts in the first instance" and
10 "reduc[ing] delays in the execution of state and federal criminal sentences." Id. at 276; Wooten
11 v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008). In light of these objectives, Petitioner's
12 arguments for his failure to exhaust his claims do not constitute good cause. Granting the
13 instant motion to stay would directly contradict AEDPA's goal of encouraging petitioners to
14 exhaust their claims without returning to state court.

15 While there is not a lot of existing case law to guide a determination of good cause for
16 failure to exhaust in a Rhines analysis, and "[t]he Ninth Circuit has explained that the Rhines
17 good cause standard does not require a petitioner to show that "extraordinary circumstances"
18 prohibited him from exhausting his claims" [Mora v. McDonald, 2009 WL 2190182, * 4 (C.D. Cal.
19 July 17, 2009) (citing Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005))], the Ninth Circuit
20 has also held that a petitioner's mere "impression" that his attorney had included a claim in an
21 appellate brief does not constitute good cause as such a standard "would render stay-and-abey
22 orders routine" and thus, "would run afoul of Rhines." Mora, 2009 WL 2190182 at * 4 (quoting
23 Wooten, 540 F.3d at 1024). The district courts are split on the issue being presented here,
24 whether or not the ineffective assistance of post-conviction counsel constitutes good cause in
25 support of a Rhines motion to stay. See Riner v. Crawford, 415 F. Supp. 2d 1207, 1210 (D.
26 Nevada Feb. 3, 2006) (stating that "[t]he federal district courts have also developed a split of
27 authority on whether ineffective assistance of post-conviction counsel qualifies as good cause
28 to permit a stay of the federal proceedings").

1 This Court agrees with the reasoning of the courts finding that the alleged ineffective
2 assistance of post-conviction counsel does not constitute good cause under Rhines. Any other
3 finding would permit all habeas petitioners to "argue that appellate counsel failed to raise certain
4 issues against the petitioner's wishes to establish good cause." Gray v. Ryan, 2012 WL 4976953,
5 * 4 (S.D. Cal. Oct. 27, 2012) (denying petitioner's motion to stay where petitioner failed to show
6 good cause for his failure to exhaust his claims and merely stated that "appellate counsel did not
7 raise the two unexhausted claims in contravention of his wishes and for reasons unknown to
8 him" and noting that "[i]f petitioner wanted to raise those issues and appellate counsel disagreed
9 with Petitioner, Petitioner could have raised them himself at that time"); see also Leon v. Barnes,
10 2013 WL 1628342, * 3 (E.D. Cal. April 15, 2013) (finding that petitioner's reasoning for failing
11 to exhaust his claims did not constitute good cause under Rhines where petitioner argued that
12 "appellate counsel did not raise his unexhausted claims against petitioner's wishes"); Meredith
13 v. Lopez, 2011 WL 2621359, * 3 (E.D. Cal. June 30, 2011) (finding no good cause where
14 petitioner "assert[ed] a stay is warranted because his trial and appellate counsel refused to
15 address the unexhausted claims in the state courts despite his insistence that they do so");
16 Hernandez v. California, 2010 WL 1854416, * 2 (N.D. Cal. May 6, 2010) (finding that petitioner
17 failed to establish good cause for a stay under Rhines where petitioner claimed he failed to
18 exhaust his claims in part because "his appellate counsel refused to present [his] claims" and
19 noting that this type of refusal by appellate counsel is a "common occurrence" and that
20 "[c]ircumstances such as these that exist for the vast majority of petitioners do not show good
21 cause for excusing non-exhaustion"). Accordingly, Petitioner's argument that his appellate
22 counsel's refusal to present the issue of the ineffective assistance of his trial counsel constitutes
23 good cause for a Rhines stay fails.

24 Because Petitioner fails to show good cause for his failure to exhaust his claim, the Court
25 need not consider the whether his arguments are plainly meritless or whether Petitioner engaged
26 in intentionally dilatory litigation tactics. Wooten, 540 F.3d at 1023. The Court therefore
27 **RECOMMENDS** that Petitioner's motion to stay and abey pursuant to Rhines be **DENIED**.

28 ///

1 **III. A STAY PURSUANT TO KELLY**

2 Because a Rhines stay is not available to Petitioner, the Court will consider if Petitioner
3 is eligible for a stay pursuant to Kelly. Under the Kelly procedure, a court may grant a stay
4 unless the new and unexhausted claims are untimely and, therefore, may not be added to the
5 existing petition. Haskins, 2009 WL 3241836 at *7. To determine whether Petitioner's new
6 claims are untimely, the Court will consider the AEDPA time limits.

7 **A. Statute of Limitations**

8 The AEDPA imposes a one-year statute of limitations on federal petitions for writ of
9 habeas corpus filed by state prisoners. 28 U.S.C. § 2244(d). The one-year limitations period
10 runs from the latest of:

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

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

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

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

18 Id. § 2244(d)(1)(A)-(D). Here, the California Supreme Court denied Petitioner's petition for
19 review on April 11, 2012. Lodgment 13. The statute of limitations began to run ninety days later
20 on July 10 2012. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (limitations period does
21 not begin until after expiration of ninety-day period for seeking certiorari). Absent tolling, the
22 limitations period expired one year later on July 10, 2013. 28 U.S.C. § 2244(d). Petitioner filed
23 a federal petition for writ of habeas corpus on July 9, 2013 [ECF No. 1], so the exhausted claims
24 asserted in the FAP are timely.

25 Accordingly, the Court **RECOMMENDS** that Petitioner be permitted a stay under Kelly
26 pending state court exhaustion of his new claim. To comply with the Kelly procedure, the Court
27 further recommends that Petitioner be required to file an amended federal habeas petition
28 deleting his unexhausted claim within seven (7) days from the date of the order adopting this

1 Report & Recommendation. The Court will then stay and hold in abeyance the amended, fully
2 exhausted petition while Petitioner continues to exhaust the deleted claims. Petitioner will then
3 be responsible for amending his federal habeas petition to reattach his newly-exhausted claims
4 to the original petition in a timely fashion.¹ If he can not demonstrate that the claim is timely
5 or relates back to the original exhausted claim, Petitioner will be unable to litigate the new claim
6 in this Court.

7 **CONCLUSION AND RECOMMENDATION**

8 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Judge issue
9 an Order: (1) approving and adopting this Report and Recommendation and (2) **DENYING**
10 Petitioner’s Motion for Stay and Abeyance pursuant to Rhines, but **GRANTING** a stay pursuant
11 to Kelly.

12 **IT IS ORDERED** that no later than **October 11, 2013**, any party to this action may file
13 written objections with the Court and serve a copy on all parties. The document should be
14 captioned “Objections to Report and Recommendation.”

15 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court
16 and served on all parties no later than **November 1, 2013**. The parties are advised that failure
17 to file objections within the specified time may waive the right to raise those objections on
18 appeal of the Court’s order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

19 **IT IS SO ORDERED.**

20 DATED: September 18, 2013

21 

22 BARBARA L. MAJOR
23 United States Magistrate Judge

24 _____
25 ¹The Court is aware that the window for Petitioner to amend his Petition with the newly exhausted claim is
26 very limited and that other issues, such as equitable tolling due to the Asiana Airliner plane crash in San Francisco,
27 may or may not prevent Petitioner from timely filing an amended petition with the newly exhausted claim. However,
28 since the possibility of timely amending and filing his petition with the newly exhausted claim does exist, no matter
how unlikely, the Court finds a stay pursuant to Kelly appropriate. Once Petitioner returns to federal court after the
resolution of the state exhaustion proceedings, Respondent is free to raise any arguments related to the statute of
limitations or relation back, which the Court will address at that time. See Hoyos v. Cullen, 2011 WL 11425, * 11
(S.D. Cal. Jan. 4, 2011).