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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY BOGARIN, <p style="text-align: right;">Petitioner,</p> v. S. HATTON, Warden, <p style="text-align: right;">Respondent.</p>		Case No. 16cv2793-BTM (BLM) ORDER: (1) DECLINING TO ADOPT THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE; (2) DENYING MOTION TO DISMISS; (3) GRANTING MOTION FOR STAY AND ABEYANCE; and (4) STAYING ACTION
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Petitioner is a state prisoner proceeding pro se and in forma pauperis with a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF No. 1.) A jury found him guilty of attempted burglary of an inhabited dwelling, the sole count in the Information. (ECF No. 11-6 at 220.) The Information also alleged he was convicted of robbery in 2004 and residential burglary in 2007, both of which constituted “strikes” under California’s Three Strikes law. (ECF No. 11-6 at 20-21.) Although Petitioner waived his right to a jury trial on prior conviction allegations, and the jury was not asked to make any findings regarding them, limited evidence of those convictions was admitted at trial on the

1 issue of intent. (ECF No. 11-2 at 78-89.) In a bifurcated proceeding the trial judge found
2 the prior conviction allegations had been proven true beyond a reasonable doubt, and
3 sentenced Petitioner to twenty-five years to life in prison plus ten years. (ECF No. 11-3 at
4 76-90.) Petitioner unsuccessfully appealed his conviction, arguing that his Fourteenth
5 Amendment right to due process was violated because there was insufficient evidence of
6 attempted burglary, and because evidence of the prior convictions was irrelevant as the
7 defense conceded intent. (ECF No. 11-11 at 6-18; ECF No. 11-7 at 10-26.)

8 Petitioner alleges in claim one here that his Sixth Amendment right to due process
9 was violated because there is insufficient evidence to support the attempted burglary
10 conviction, and because his sentence of essentially life without parole was imposed based
11 on facts which were not found by a jury beyond a reasonable doubt as required by Apprendi
12 v. New Jersey, 530 U.S. 466 (2000) (holding that other than the fact of a prior conviction,
13 any fact used to increase a sentence above the statutory maximum must be found by a jury
14 beyond a reasonable doubt), Blakely v. Washington, 542 U.S. 296 (2004) (holding that the
15 statutory maximum for Apprendi purposes is the maximum sentence permitted to be
16 imposed solely by the jury verdict or a defendant's admission), and Cunningham v.
17 California, 549 U.S. 270 (2007) (holding that California's sentencing law violated the right
18 to a jury trial to the extent it permits a judge to impose an upper term sentence in the
19 absence of an aggravating factor established by the jury's verdict, a defendant's admission,
20 or a prior conviction). (ECF No. 1 at 6-10.) He alleges in claim two that his Eighth and
21 Fourteenth Amendment rights to due process were violated because the use of his prior
22 convictions violated the plea agreements in those cases. (ECF No. 1 at 11-14.) He alleges
23 in claim three that his Sixth and Fourteenth Amendment rights were violated because his
24 sentence is not based on his culpability in the attempted burglary count, but on the prior
25 convictions. (ECF No. 1 at 15-20.) Finally, he alleges in claim four that the use of the
26 prior convictions violated Ex Post Facto principles. (ECF No. 1 at 21-25.)

27 Respondent has filed a Motion to Dismiss the Petition. (ECF No. 10.) Respondent
28 contends that because none of the claims presented in the Petition were presented on direct

1 appeal, and Petitioner has not filed a state habeas petition, he has failed to exhaust state
2 court remedies as to his claims, which in turn renders them procedurally defaulted in this
3 Court. (Id. at 4-6.) Respondent seeks dismissal with prejudice on the grounds that
4 Petitioner is unable to demonstrate cause and prejudice, or a fundamental miscarriage of
5 justice, sufficient to excuse the default. (Id. at 6.)

6 Presently before the Court is a Report and Recommendation (“R&R”) by United
7 States Magistrate Judge Barbara L. Major which recommends granting Respondent’s
8 Motion to Dismiss. (ECF No. 17.) The Magistrate Judge found that Petitioner has not
9 exhausted state court remedies as to any claim presented in the Petition because he has
10 presented none of the claims to any state court. (R&R at 4-5.) The Magistrate Judge also
11 found that Respondent’s procedural default argument was not properly before the Court
12 because Petitioner’s direct appeal became final on September 6, 2016, and it was unclear
13 whether Petitioner could still return to state court to timely exhaust his claims through
14 habeas. (R&R at 3-5.) The Magistrate Judge recommended granting Respondent’s Motion
15 to Dismiss on exhaustion grounds, and dismissing the Petition without prejudice to
16 Petitioner to filing a new Petition in this Court after he has exhausted his state court
17 remedies. (R&R at 5.)

18 Petitioner has filed objections to the R&R, along with a Motion for Stay and
19 Abeyance. (ECF No. 20.) Petitioner states that if the Court requires him to return to state
20 court to exhaust, he requests the Court stay this action and hold his Petition in abeyance
21 until he has completed the exhaustion process. (Id. at 1.) He attaches a state habeas petition
22 containing the unexhausted claims raised in his Petition here, which appears to have been
23 constructively filed in the state superior court on August 9, 2017. (Id. at 8-28.)

24 The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(1), which provides
25 that: “A judge of the court shall make a de novo determination of those portions of the
26 report or specified proposed findings or recommendations to which objection is made. A
27 judge of the court may accept, reject, or modify, in whole or in part, the findings or
28 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

1 The Magistrate Judge found that none of the claims presented in the Petition have
2 been presented to the state court. (R&R at 5.) However, the aspect of claim one alleging
3 insufficient evidence to support the attempted robbery conviction was presented to the state
4 appellate court on direct appeal (Lodgment No. 5 at 6-11 [ECF No. 11-7 at 10-15]), and to
5 the state supreme court in the subsequent petition for review (Lodgment No. 9 at 2-5 [ECF
6 No. 11-11 at 6-9]). It appears clear that Petitioner has never presented his remaining claims
7 to the California Supreme Court, and therefore has not exhausted state court remedies as
8 to those claims. Because the Petition contains both exhausted and unexhausted claims, the
9 Court declines to adopt the Magistrate Judge's finding that all claims are unexhausted.

10 Because Respondent's Motion to Dismiss is predicated on the erroneous contention
11 that all claims in the Petition are unexhausted, the Court **DENIES** the Motion to Dismiss.
12 The denial is without prejudice to Respondent to raise any procedural arguments at a later
13 stage in this case.

14 Finally, Petitioner seeks to have this action stayed and the Petition held in abeyance
15 while he completes the exhaustion process, and indicates that he has already begun the
16 process by presenting his unexhausted claims to the superior court in a habeas petition.
17 The Supreme Court has recognized that a petitioner who files a mixed petition and who
18 risks expiration of the one-year statute of limitations while that petition is pending in the
19 district court, such as Petitioner here, is entitled to a determination whether the court should
20 exercise its discretion to stay the petition while the petitioner exhausts state court remedies.
21 Rhines v. Weber, 544 U.S. 269, 275-76 (2005). Petitioner must demonstrate there are
22 arguably meritorious claim(s) which he wishes to return to state court to exhaust, that he is
23 diligently pursuing his state court remedies with respect to those claim(s), and that good
24 cause exists for his failure to timely exhaust his state court remedies. Id. at 277-78.

25 Petitioner has established good cause based on his pro se status in state post-conviction
26 proceedings. Dixon v. Baker, 847 F.3d 714, 720-22 (9th Cir. 2017). It appears Petitioner
27 is proceeding diligently, as he is currently exhausting his state court remedies. In addition,
28 the one-year statute of limitations in this action began to run on September 7, 2016, one

1 day after expiration of Petitioner’s 90-day period to file a petition for a writ of certiorari in
2 the United States Supreme Court following the June 8, 2016, denial of his petition for
3 review by the state supreme court. Bowen v. Roe, 188 F.3d 1157, 1158-60 (9th Cir. 1999);
4 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). There were 29 days left on the
5 limitations period when Petitioner constructively filed his state habeas petition on August
6 9, 2017.¹ It is premature at this time to make a determination whether Petitioner is entitled
7 to statutory tolling based on a complete round of state habeas petitions, because it is unclear
8 how the state court will treat those petitions. See 28 U.S.C. § 2244(d)(2) (“The time during
9 which a *properly filed* application for State post-conviction or other collateral review with
10 respect to the pertinent judgment or claim is pending shall not be counted toward any period
11 of limitation under this subsection.”) (italics added); Artuz v. Bennett, 531 U.S. 4, 8 (2000)
12 (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the
13 appropriate court officer for placement into the record] are in compliance with the
14 applicable laws and rules governing filings.”) To the extent Petitioner is entitled to tolling
15 for one complete round of state habeas, he will have 29 days left on the limitations period
16 when and if the state supreme court denies his final habeas petition. Nino v. Galaza, 183
17 F.3d 1003, 1006 (9th Cir. 1999) (“[W]e hold that the statute of limitations is tolled from
18 the time the first state habeas petition is filed until the California Supreme Court rejects the
19 petitioner’s final collateral challenge.”), overruled in part by Carey v. Saffold, 536 U.S.
20 214, 225-26 (2002) (holding that if a petitioner unreasonably delays filing a habeas petition
21 in a higher California court after a denial in a lower court, he is not entitled to statutory
22 tolling during the gap between those petitions). However, if Petitioner is not entitled to
23 tolling for any reason, and the Court dismisses his Petition now, any later filed federal
24 petition may be untimely. Petitioner would therefore lose his ability to proceed even with
25 the exhausted claim presented in the Petition, which counsels in favor of a stay.

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27 ¹ Petitioner is entitled to the benefit of the “mailbox” rule which provides that his pro se filings are
28 considered to have been constructively filed as of the date he hands them to prison authorities for mailing
to a court. Anthony v. Cambra, 236 F.3d 568, 574-75 (9th Cir. 2000).

1 Finally, Petitioner must have arguably meritorious claims which he is exhausting, that
2 is, claims which are not “plainly meritless.” Rhines, 544 U.S. at 277. Petitioner’s
3 unexhausted claims here allege violations of the federal Constitution’s Ex Post Facto, Due
4 Process and Contract Clauses arising from the use of his prior convictions to sentence him
5 to essentially life without parole for attempted burglary. With respect to what constitutes
6 a “plainly meritless” claim, the Ninth Circuit has stated:

7 A federal habeas petitioner must establish that at least one of his
8 unexhausted claims is not “plainly meritless” in order to obtain a stay under
9 Rhines, 544 U.S. at 277. In determining whether a claim is “plainly
10 meritless,” principles of comity and federalism demand that the federal court
11 refrain from ruling on the merits of the claim unless “it is perfectly clear that
12 the petitioner has no hope of prevailing.” Cassett v. Stewart, 406 F.3d 614,
13 624 (9th Cir. 2005). “A contrary rule would deprive state courts of the
14 opportunity to address a colorable federal claim in the first instance and grant
15 relief if they believe it is warranted.” Id. (citing Rose v. Lundy, 455 U.S. 509,
16 151 (1982)).

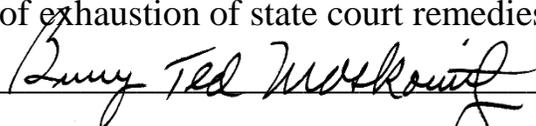
17 Dixon, 847 F.3d at 722.

18 Because, at least at this time, it is not “perfectly clear that the petitioner has no hope
19 of prevailing” on his unexhausted claims, id., because Petitioner has satisfied the other
20 Rhines requirements, and because it appears the one-year statute of limitations either has
21 not yet expired or could potentially prevent Petitioner from ever having a federal court
22 address his currently exhausted claim if the Court were to dismiss the Petition at this time,
23 the Court **GRANTS** Petitioner’s Motion for Stay and Abeyance.

24 **CONCLUSION AND ORDER**

25 As set forth above, the Court **DECLINES TO ADOPT** the findings and conclusions
26 of the Magistrate Judge, **DENIES** Respondent’s Motion to Dismiss without prejudice, and
27 **GRANTS** Petitioner’s Motion for Stay and Abeyance. This action is **STAYED**. Petitioner
28 shall notify the Court within thirty (30) days of exhaustion of state court remedies.

DATED: October 27, 2017


BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE