



1 while returning to state court, Sarmiento requests a *Rhines* stay or, alternatively, a *Kelly*  
2 stay. (ECF 4, at 5-10.) The State agrees to a stay under *Kelly*, but not under *Rhines*.  
3 (ECF 11, at 2.)

## 4 DISCUSSION

5 A state prisoner must exhaust available state remedies before seeking federal habeas  
6 relief. 28 U.S.C. § 2254(b)(1)(A). In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme  
7 Court adopted a “total exhaustion rule,” requiring federal courts to “dismiss habeas  
8 petitions containing both unexhausted and exhausted claims.” *Id.* at 522. After dismissal,  
9 an inmate may delete unexhausted claims and “resubmit a petition with only exhausted  
10 claims,” or return to state court “to exhaust the remainder of [his] claims.” *Id.* at 520. In  
11 1996, Congress passed the Antiterrorism and Effective Death Penalty Act. The AEDPA  
12 imposed a one-year statute of limitations for filing federal petitions, which had dramatic  
13 repercussions on the total-exhaustion rule. *See* 28 U.S.C. § 2244(d). Now prisoners “whose  
14 mixed petitions were dismissed under *Rose*” risked “being time-barred from bringing their  
15 claims again, once exhausted, in federal court.” *King v. Ryan*, 564 F.3d 1133, 1138 (9th Cir.  
16 2009).

17 Courts responded to this dilemma by developing two distinct procedures: the *Rhines*  
18 stay and the *Kelly* stay. Both are analyzed below.

### 19 A. *Rhines* Stay

20 *Rhines* allows petitioners to stay an entire petition—including unexhausted claims—  
21 while they return to state court to exhaust their remedies. *Rhines*, 544 U.S. at 278. A court  
22 may grant a *Rhines* stay when (1) “the petitioner had good cause for his failure to exhaust,”  
23 (2) “his unexhausted claims are potentially meritorious,” and (3) “there is no indication  
24 that the petitioner engaged in intentionally dilatory litigation tactics.” *Id.* Good cause  
25 requires more than just a “bald assertion.” *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir.  
26 2014). Instead, a good-cause showing “turns on whether the petitioner can set forth a  
27 reasonable excuse, supported by sufficient evidence, to justify [the failure to exhaust].” *Id.*  
28

1           **1. Ground Two (Jury-Instruction Error)**

2           Sarmiento’s misunderstanding about whether his second ground was exhausted is  
3 not good cause. “[A] petitioner [does] not establish good cause simply by alleging that he  
4 was ‘under the impression’ that his claim was exhausted.” *Id.* at 981. And “unspecific,  
5 unsupported excuses for failing to exhaust—such as unjustified ignorance—[do] not satisfy  
6 the good cause requirement.” *Id.* “[I]f the court was willing to stay mixed petitions based  
7 on a petitioner’s lack of knowledge that a claim was not exhausted, virtually every habeas  
8 petitioner . . . could argue that he *thought* his counsel had raised an unexhausted claim and  
9 secure a stay.” *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). So, there is no  
10 good cause for failing to exhaust Ground Two.

11           **2. Ground Three (Ineffective Assistance of Counsel)**

12           Sarmiento argues that he had good cause for not exhausting his third ground—  
13 ineffective assistance of counsel—because his state “appellate counsel did not go beyond  
14 the record” to identify his trial attorney’s errors. (*See* ECF 4, at 7.) In particular, counsel  
15 allegedly failed “to find the missing evidence, challenge false evidence or investigate the  
16 facts that would give [Sarmiento] relief.” (*Id.*; *see also* ECF 13, at 3-4.)

17           Ineffective assistance “by post-conviction counsel can be good cause for a *Rhines*  
18 stay.” *Blake*, 745 F.3d at 983. In *Blake*, petitioner argued that his post-conviction counsel  
19 failed to “discover easily identifiable claims that [petitioner] had endured outrageous and  
20 severe sexual, physical and emotional abuse as a child and suffered from organic brain  
21 damage and psychological disorders.” *Id.* at 979 (quotation marks omitted). Petitioner  
22 supported his good-cause argument with “a neuropsychological and psychological  
23 evaluation report,” “a declaration by the private investigator,” and “thirteen declarations”  
24 from his family and friends describing “the abhorrent conditions of [petitioner’s]  
25 upbringing.” *Id.* at 983. Yet post-conviction counsel presented none of this in court. *Id.* The  
26 Ninth Circuit found that petitioner’s showing “was not a bare allegation of state post-  
27 conviction [ineffective assistance], but a concrete and reasonable excuse, supported by  
28 evidence” that “satisfie[d] the *Rhines* good cause standard.” *Id.* at 983-84.

1 Unlike the *Blake* petitioner who went far beyond a “bare allegation,” Sarmiento only  
 2 supports his good-cause argument with conclusory statements. *See Blake*, 745 F.3d at 983;  
 3 (*see generally* ECF 4; ECF 13). Thus, there is no good cause for his failure to exhaust the  
 4 third ground, and we “need not reach the other two factors in the *Rhines* test.” *See Wooten*,  
 5 540 F.3d at 1023. Sarmiento does not qualify for a *Rhines* stay.

6 **B. Kelly Stay**

7 Unlike a *Rhines* stay, *Kelly* only holds in abeyance “fully exhausted petitions,  
 8 requiring that any unexhausted claims be dismissed” while the petitioner returns to state  
 9 court. *King*, 564 F.3d at 1140. Prisoners may later amend their petitions to re-attach newly-  
 10 exhausted claims, but the claims must be timely under the AEDPA or “relate back” to the  
 11 pending fully exhausted petition. *Id.* at 1140-41. Due to these constraints, *Kelly* is “not only  
 12 a more cumbersome procedure” than *Rhines*, “but also a riskier one.” *Id.* at 1140.

13 On the other hand, *Kelly* “does not require that a petitioner show good cause.” *King*,  
 14 564 F.3d at 1135. A *Kelly* stay is “particularly appropriate when an outright dismissal will  
 15 render it unlikely or impossible for the petitioner to return to federal court within the one-  
 16 year limitation period . . . .” *Kelly*, 315 F.3d at 1070. That is the situation here. The one-  
 17 year limitation for filing a federal habeas petition expired on September 10, 2020.<sup>1</sup> Because  
 18 Sarmiento filed his amended habeas petition on July 16, 2020, his current petition is timely,  
 19 but future amendments won’t be. (ECF 3.) If the Court were to dismiss this mixed petition  
 20

---

21  
 22 <sup>1</sup> On June 12, 2019, the California Supreme Court denied Sarmiento’s petition for  
 23 review. *People v. Sarmiento*, No. S255153, 2019 Cal. LEXIS 4187, at \*1 (Cal. June 12,  
 24 2019). Sarmiento did not seek certiorari, so his conviction became final when the “ninety-  
 25 day certiorari period” lapsed on September 10, 2019. *See Bowen v. Roe*, 188 F.3d 1157,  
 1159 (9th Cir. 1999). The limitations period ended one year later, on September 10, 2020.  
*See* 28 U.S.C. § 2244(d)(1).

26 Although collateral review statutorily tolls the limitation, this only applies during  
 27 state habeas corpus review, not during a pending federal petition. *Duncan v. Walker*,  
 28 533 U.S. 167, 181-82 (2001). There is no indication that Sarmiento filed any state habeas  
 petitions, so statutory tolling is unavailable. Furthermore, neither party has raised any  
 equitable-tolling arguments.

1 “outright” under *Rose*, it would be “unlikely or impossible” for Sarmiento to re-file in  
2 federal court. *See Kelly*, 315 F.3d at 1070. So, Sarmiento is entitled to a *Kelly* stay.

3 A *Kelly* stay involves three steps: (1) Sarmiento must “amend[] his petition to delete  
4 any unexhausted claims”; (2) the Court then “stays and holds in abeyance the amended,  
5 fully exhausted petition, allowing the petitioner to proceed to state court to exhaust the  
6 deleted claims”; and (3) Sarmiento “later amends his petition and re-attaches the newly-  
7 exhausted claims to the original petition.” *See King*, 564 F.3d at 1135.

### 8 CONCLUSION

9 The Court recommends that the following orders be entered:

- 10 1. Sarmiento’s motion for a *Rhines* stay is **DENIED**.
- 11 2. Sarmiento’s motion for a *Kelly* stay is **GRANTED**.
- 12 3. Within 30 days, Sarmiento must file a Notice of Dismissal to dismiss without  
13 prejudice his unexhausted claims (Grounds Two and Three of his First Amended  
14 Petition). If Sarmiento fails to timely withdraw his unexhausted claims, the Court  
15 will dismiss the entire mixed petition.
- 16 4. The parties must jointly file periodic status reports summarizing Sarmiento’s  
17 efforts to exhaust his dismissed claims. The first report will be due by March 1,  
18 2021, and subsequent reports will be due every three months thereafter (that is,  
19 June 1, 2021; September 1, 2021; etc.).
- 20 5. Within 45 days of the state court’s decision resolving his claims, Sarmiento must  
21 file a motion requesting that the stay be lifted and that he be granted leave to file  
22 an amended petition. The request should include his proposed amended petition  
23 and demonstrate that the new claims are timely or relate back to the pending  
24 petition.

25 The parties must file any objections to this report by January 21, 2021. *See* 28 U.S.C.  
26 § 636(b)(1). The party receiving any such objection has 14 days to file any response. Fed.  
27 R. Civ. P. 72(b)(2).

28 Dated: January 7, 2021

  
Hon. Andrew G. Schopler  
United States Magistrate Judge