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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JAIME BENAVENTE, JR.,	)	1:08-cv-00085 YNP DLB (HC)
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTIONS TO STAY
v.	)	
	)	[Docs. #36, 39]
ANTHONY HEDGPETH,	)	
	)	
Respondent.	)	

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Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**BACKGROUND**

A jury found Petitioner guilty in Tulare County Superior Court of one count of car jacking and one count of resisting, delaying, or obstructing a peace officer. (Lodged Doc. 4, 2.) Both counts included gang enhancements. Id. Petitioner raised the following claims on direct appeal to the State appellate court: 1) “[t]he gang expert’s speculative opinion regarding the criminal street gang allegation on court 2 (resisting arrest) does not constitute substantial evidence on appeal, and trial counsel was ineffective in failing to object on the proper legal grounds to the expert’s speculative opinion”; and 2) “[a]ppellant’s sentence of 15 years to life for carjacking [sic] with a criminal street gang enhancement constitutes cruel and/or unusual punishment under both the state and federal constitutions.” (Lodged Doc. 1, i-ii.) The appellate court affirmed the lower court in a reasoned decision. (Lodged Doc. 4.)

1 Petitioner raised the same two claims in his petition for review in the California Supreme  
2 Court. (Lodged Doc. 5.) The court summarily denied the petition on December 20, 2006. (Lodged  
3 Doc. 6.)

4 Petitioner filed the instant petition on December 20, 2007. (Doc. #1.) On March 20, 2008,  
5 Petitioner filed a motion to stay his petition so he could exhaust his state court remedies. (Doc. #13.)  
6 Some time thereafter, Petitioner retained counsel who filed a second motion to stay on July 3, 2008,  
7 arguing that Petitioner had “good cause” under Rhines v. Webber, 544 U.S. 269 (2005), to have his  
8 petition stayed and held in abeyance because he did not have an attorney before to help him properly  
9 exhaust his claims in State court. (Doc. #24.) On July 10, 2008, Respondent filed an opposition to  
10 the motion arguing that Petitioner had not shown “good cause”, that Petitioner did not specify the  
11 unexhausted claims he hoped to exhaust, and that Petitioner did not explain why the those claims  
12 remained unexhausted. (Doc. #25.) Petitioner responded to the opposition by specifying that he  
13 wanted to exhaust a new claim of actual innocence. (Doc. #26.) On September 15, 2008, this Court  
14 denied Petitioner’s motion to stay because Petitioner failed to show “good cause” as to why he could  
15 only now exhaust the claim of actual innocence. (Doc. #27.) On October 6, 2008, the Court denied  
16 Petitioner’s first motion to stay as moot. (Doc. #32.)

17 On September 17, 2008, Petitioner’s counsel filed a motion to withdraw due to conflict of  
18 interest. (Doc. #28.) The motion was granted on October 2, 2008. (Doc. #30.)

19 On October 2, 2008, Petitioner, once again proceeding pro se, filed another motion to stay  
20 claiming that he had “good cause” because his attorney who had filed the previous motion to stay had  
21 “failed to do his duties and responsibilities as an attorney of law.” (Doc. #31, 1.) Petitioner alleged  
22 that counsel did not give him proof that counsel had conducted a thorough investigation, counsel  
23 misled him, and that “counsel failed to comprehend regulations that Petitioner is entitled too [sic].”  
24 Id. at 1-2. This Court denied this third motion to stay on October 6, 2008. (Doc. #32.)

25 On May 8, 2009, Petitioner filed a fourth motion to stay alleging he had “good cause” because  
26 his habeas counsel had sabotaged him and he had newly discovered evidence in the form of a one  
27 page affidavit. (Doc. #36.) On July 22, 2009, Petitioner filed a fifth motion to stay, which is identical  
28 to the fourth motion to stay except that the fifth includes exhibits. (Doc. #39.) It is Petitioner’s

1 fourth and fifth motions to stay that will be considered herein.

### 2 3 DISCUSSION

4 The 9th Circuit has clearly specified two possible analyses by which to decide a motion to  
5 stay. King v. Ryan, 564 F.3d 1133. One analysis is Rhines, where, in limited circumstances and  
6 upon the court’s discretion, a petitioner can have his entire petition stayed and placed in abeyance  
7 while he exhausts the unexhausted claims in state court. King, 564 F.3d at 1135-36 (citing Rhines v.  
8 Webber, 544 U.S. 269). The second analysis is the Kelly three-step procedure. Under Kelly, a  
9 petitioner first amends his mixed petition to delete any unexhausted claims. Next the court will stay  
10 and hold in abeyance the amended, and now fully exhausted, petition while the petitioner exhausts the  
11 deleted claims in state court. Finally, the petitioner amends his stayed petition to re-attach the now  
12 fully exhausted claims that he had previously deleted. King, 564 F.3d at 1135 (citing Kelly v. Small,  
13 315 F.3d 1063, 1070-71 (9th Cir. 2002)).

14 There are two important distinctions between Rhines and Kelly. First, Rhines stays and holds  
15 in abeyance both the exhausted and unexhausted claims where as Kelly requires the petitioner to  
16 delete the unexhausted claims and only stays and holds in abeyance the fully exhausted petition. This  
17 is an important distinction because under Kelly a petitioner must still amend to add his deleted claims  
18 within the original one year statute of limitation set forth by the Anti-Terrorism and Effective Death  
19 Penalty Act of 1996. King, 564 F.3d at 1138-39; 28 U.S.C. § 2244(d)(1). Under Rhines a petitioner,  
20 however, need not worry about the statute of limitation because his unexhausted claims never leave  
21 federal court. King, 564 F.3d at 1139, 1140 (citing Rhines, 544 U.S. at 277).

22 The second difference between the two analyses is that Rhines requires a showing of good  
23 cause, while Kelly does not. King, 564 F.3d at 1140. Even though Kelly does not require a showing  
24 of good cause, the Court was clear that the “district courts retain the same degree of discretion they  
25 had before Rhines to implement the Kelly procedure...” King, 564 F.3d at 1141.

26 In this case, Petitioner does not seek to stay a mixed petition; he seeks to hold all of his  
27 original claims in abeyance while he exhausts a new claim of actual innocence. Because Petitioner is  
28 trying to stay a fully exhausted petition, Kelly seems to provide the appropriate standard. As

1 mentioned above, the major hurdle which a petitioner seeking to stay his petition under Kelly must  
2 overcome is amending his petition to include the newly exhausted claims within the original one-year  
3 limitation period. Petitioner did not file his original Federal petition until the final day of the limitation  
4 period and more than two years have since passed. The Court cannot conceive of scenario in which  
5 Petitioner could successfully attach any new claim with in the original limitation period. It would  
6 serve no purpose to grant Petitioner a stay and allow him to exhaust this new claim in State court  
7 only to hold that his new claim was untimely when he returned to federal court; thus, Petitioner's  
8 motion to stay must be DENIED.

9 The court notes that if a petitioner engages in abusive litigation tactics or intentional delay, the  
10 district court should not grant a stay. Rhines, 544 U.S. at 277. The motions at hand are Petitioner's  
11 fourth and fifth motions to stay. The Court has already found that Petitioner's lack of legal  
12 knowledge does not constitute "good cause", that his tenuous claim of new evidence does not  
13 constitute "good cause", and that counsel's failure to win the second motion to stay does not  
14 constitute "good cause"; Petitioner presents no new arguments in the instant motions that have not  
15 already been denied. If Petitioner files another motion to stay containing any argument on which the  
16 Court has already ruled, the Court will immediately deny the motion under Rhines.

### 17 CONCLUSION

18 Petitioner's motions to stay are too untimely to allow new claims to be added within the  
19 original one-year limitation period and thereby must be DENIED.

### 20 ORDER

21 Accordingly, IT IS HEREBY ORDERED that Petitioner's motion to stay, or in the  
22 alternative to amend the petition is DENIED.

23 IT IS SO ORDERED.

24 **Dated: February 19, 2010**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE