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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHNNY LUGO IBARRA,

1:10-cv-1809-LJO-DLB (HC)

Petitioner,

ORDER VACATING FINDINGS AND
RECOMMENDATION ISSUED MARCH 3,
2011 AND GRANTING PETITIONER'S
REQUEST TO STAY PETITION PURSUANT
AND SETTING BRIEFING SCHEDULE

v.

ANTHONY HEDGPETH,

[Doc. 24]

Respondent.

_____ /

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

On March 3, 2011, the undersigned issued Findings and Recommendation that Respondent's motion to dismiss the instant petition as a mixed petition containing both exhausted and unexhausted claims be granted, unless Petitioner elects to dismiss the unexhausted claims.

On April 11, 2011, Petitioner filed a motion to stay and hold the petition in abeyance while he returns to state court to exhausted the unexhausted claims.

On May 3, 2011, the Court advised Petitioner that he had not made a sufficient showing to warrant a stay under Rhines v. Weber, 544 U.S. 269 (2005), but the Court could hold the petition in abeyance under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) if Petitioner so desired.

On June 6, 2011, Petitioner filed a response to the Court's May 3, 2011, order requesting that the Court hold the petition in abeyance pursuant to Kelly.

1 It is HEREBY ORDERED that:

- 2 1. Pursuant to the Court's May 3, 2011 order and Petitioner's response thereto, the
3 Findings and Recommendation issued March 3, 2011 are VACATED;
- 4 2. Petitioner'S motion to stay is GRANTED and the unexhausted claims presented
5 as Claims One through Nine in the original petition are stricken without prejudice
6 and this action is administratively stayed pursuant to King;
- 7 3. Petitioner is DIRECTED to file a status report within thirty (30) days of the date
8 of service of this order;
- 9 4. Petitioner is DIRECTED to file a new status report every thirty (30) days after
10 filing his initial status report;
- 11 5. Petitioner is GRANTED thirty (30) days time following the final order of the state
12 courts in which to advise this Court of the finality of the state proceedings and file
13 an amended petition; and
- 14 6. Failure to comply with this order will result in the Court vacating the stay and
15 proceeding with the action.

16 IT IS SO ORDERED.

17 **Dated: June 15, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE