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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY LEWIS,

Petitioner,

No. 2:04-cv-1136 JAM EFB P

vs.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,

Respondents.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 17, 2004, the magistrate judge previously assigned to this case found that the petition contained both exhausted and unexhausted claims. Dckt. No. 5 at 3. That magistrate judge recommended that petitioner’s unexhausted claims be stricken and that the case be stayed to allow petitioner to exhaust his unexhausted claims. *Id.* at 3-4. On January 26, 2005, the previously assigned district judge adopted the findings and recommendations in full and ordered petitioner’s unexhausted claims stricken, the case stayed, and petitioner to file within 120 days a status report stating whether he had exhausted his available state remedies. Dckt. No. 6.

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1 On May 24, 2005, petitioner filed a status report asking for more time to exhaust his state  
2 remedies. Dckt. No. 7. The then-assigned magistrate judge ordered petitioner to “notify the  
3 court and respondents forthwith when he has exhausted available state remedies.” Dckt. No. 8.

4 More than six years later, the case was reassigned to District Judge John A. Mendez and  
5 to the undersigned magistrate judge. Dckt. No. 9. By order dated January 26, 2012, the  
6 administrative stay in this case was lifted and respondent was ordered to file a response to the  
7 petition. Petitioner subsequently filed two motions for appointment of counsel; both were  
8 denied. Presently before the court are petitioner’s motions for reconsideration of his request for  
9 appointment of counsel, to stay this proceeding, for a 15-month extension of time to file a  
10 traverse; to voluntarily dismiss the petition, and to amend the petition. Dckt. Nos. 22, 23.

11 **I. Motion for Reconsideration of Petitioner’s Request for Counsel**

12 As petitioner is aware, there currently exists no absolute right to appointment of counsel  
13 in habeas proceedings. *See Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996). However, the  
14 court may appoint counsel at any stage of the proceedings “if the interests of justice so require.”  
15 *See* 18 U.S.C. § 3006A; *see also*, Rule 8(c), Rules Governing § 2254 Cases. After reviewing  
16 petitioner’s pleadings, including his new request to appoint him counsel, the court again finds  
17 that the interests of justice would not be served by the appointment of counsel at this stage of the  
18 proceedings.

19 **II. Motion to Stay**

20 Petitioner requests that this court stay the proceeding and hold it in abeyance so he can  
21 exhaust his unexhausted claims.<sup>1</sup> Dckt. No. 22.

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25 <sup>1</sup> Although petitioner does not state which claims he wishes to exhaust, it may be  
26 presumed that petitioner seeks to exhaust the claims that were dismissed from his petition  
pursuant to the court’s January 26, 2005 order.

1           There are two approaches for analyzing stay-and-abey motions—one provided for by *Kelly*  
2 *v. Small*, 315 F.3d 1063 (9th Cir. 2002) and the other by *Rhines v. Weber*, 544 U.S. 269 (2005).  
3 *King v. Ryan*, 564 F.3d 1133, 1138-41 (9th Cir. 2009).

4           *Kelly* provides that a district court may stay a petition containing only exhausted claims  
5 and hold it in abeyance pending exhaustion of additional claims which may then be added to the  
6 petition through amendment. *Kelly*, 315 F.3d at 1070-71; *King*, 564 F.3d at 1135. If a petition  
7 contains both exhausted and unexhausted claims (a so-called “mixed” petition), a petitioner  
8 seeking a stay under *Kelly* must dismiss the unexhausted claims from the petition and seek to add  
9 them back in through amendment after exhausting them in state court. *King*, 564 F.3d at 1138-  
10 39. The previously unexhausted claims, once exhausted, must be added back into the federal  
11 petition within the statute of limitations provided for by 28 U.S.C. § 2244(d)(1), however. *King*,  
12 564 F.3d at 1140-41. Under that section, a one-year limitation period for seeking federal habeas  
13 relief begins to run from the latest of the date the judgment became final on direct review, the  
14 date on which a state-created impediment to filing is removed, the date the United States  
15 Supreme Court makes a new rule retroactively applicable to cases on collateral review or the  
16 date on which the factual predicate of a claim could have been discovered through the exercise  
17 of due diligence. 28 U.S.C. § 2241(d)(1). A federal habeas petition does not toll the limitations  
18 period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

19           Under *Rhines*, a district court may stay a mixed petition in its entirety, without requiring  
20 dismissal of the unexhausted claims while the petitioner attempts to exhaust them in state court.  
21 *King*, 564 F.3d at 1139-40. Unlike the *Kelly* procedure, however, *Rhines* requires that the  
22 petitioner show good cause for failing to exhaust the claims in state court prior to filing the  
23 federal petition. *Rhines*, 544 U.S. at 277-78; *King*, 564 F.3d at 1139. In addition, a stay  
24 pursuant to *Rhines* is inappropriate where the unexhausted claims are “plainly meritless” or  
25 where the petitioner has engaged in “abusive litigation tactics or intentional delay.” *Id.*

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1           Petitioner need not satisfy the requirements under *Rhines*, as the instant petition no longer  
2 contains unexhausted claims. As discussed above, on January 26, 2005, the assigned district  
3 judge dismissed petitioner’s unexhausted claims and granted petitioner a stay of proceedings to  
4 give petitioner an opportunity to exhaust his state remedies. Dckt. No. 6. Six years after this  
5 proceeding was stayed, the undersigned ordered petitioner to show cause why the action should  
6 not be dismissed for failure to prosecute. Dckt. No. 10. Petitioner’s response to the order to  
7 show cause stated that he had not yet exhausted his state remedies. Dckt. No. 11 at 5. Petitioner  
8 provided various reasons for his inability to exhaust his state remedies, including lack of legal  
9 knowledge, retained counsel’s failure to provide assistance with his case, transfers between  
10 prisons, and inability to procure necessary documents. *Id.* at 2-4. In the January 26, 2012 order  
11 lifting the stay, the court explained that petitioner did not claim that any of the alleged setbacks  
12 actually prevented him from filing his state habeas petition in the last six years. Dckt. No. 12.

13           Petitioner, in his most recent request for a stay, provides a new reason for why he has not  
14 exhausted his state remedies; i.e., that the instant petition was erroneously delivered to the  
15 district court and that he believed the instant proceeding was a state habeas proceeding. Dckt.  
16 No. 22 at 1-2. Petitioner further states that “[t]hroughout all correspondence, at no point had  
17 Petitioner’s Habeas been addressed as a ‘Federal’ Habeas until the Respondent filed its Answer  
18 on April 24, 2012.” *Id.* at 2. He further claims that he assumed this court “was treating the  
19 Habeas claims as State issues that are presently being exhausted through this proceeding with the  
20 Court.” *Id.*

21           Contrary to petitioner’s contention, the instant petition has previously been referred to as  
22 a “federal” petition. The November 17, 2004 findings and recommendations stated, “In his  
23 *federal application*, petitioner challenges . . . .” Dckt. No. 5 at 3 (emphasis added). The  
24 findings and recommendations also observed that “[p]etitioner sought no habeas relief in state  
25 court.” *Id.* at 2. Even if it is assumed that petitioner mistakenly initiated this action in federal  
26 court, the November 17, 2004 findings and recommendations put petitioner on notice that he

1 filed a federal application in federal court. Thus, it appears that petitioner's proffered reason are  
2 disingenuous.

3 Petitioner also requests that the matter be stayed to enable him to acquire legal assistance.  
4 *Id.* at 4. Petitioner explains that he has requested the Northern California Innocence Project  
5 assist him with his habeas petition. *Id.* He states that the Innocence Project has acknowledged  
6 receipt of his requests, but that there is a waiting period of several months to 5 years. *Id.* Given  
7 that this action was commenced nearly nine years ago, and that petitioner has had more than  
8 eight years to exhaust his state remedies, the possibility that petitioner may be able to obtain pro  
9 bono counsel does not warrant granting petition a second stay.

10 Furthermore, petitioner has not been diligent in his efforts to comply with this court's  
11 instructions which further renders a stay inappropriate here. Although the matter was initially  
12 stayed more than eight years ago, there is no indication that petitioner has filed a habeas petition  
13 with any state court. Because petitioner has been provided sufficient time to exhaust his state  
14 remedies, but has failed to provide an adequate justification for his failure to do so, it is  
15 recommended that the request to further stay the petition under the *Kelly* procedure be denied.

16 **III. Request For 15-Month Extension of Time to File A Traverse**

17 Petitioner requests that in the event his motion for a stay and motion for reconsideration  
18 are denied, the court grant him a 15 month extension of time to file a traverse. *See* Fed. R. Civ.  
19 P. 6(b). He provides no justification for an extension of that length. Accordingly, petitioner's  
20 request for an extension of time is denied in part and granted in part. Petitioner shall have 60  
21 days from the date this order is served to file and serve a traverse. Further requests for  
22 extensions of this deadline will be viewed with disfavor.

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1 **IV. Conditional Withdrawal of Petition**

2 Petitioner also moves to withdrawal his petition, “on the Condition that Petitioner will  
3 not be legally or irreparably harmed in future appellate proceedings.”<sup>2</sup> Dckt. No. 6. Federal  
4 Rule of Civil Procedure 41(a)(1) permits a party to voluntarily dismiss an action without a court  
5 order by filing a notice of dismissal prior to the opposing party filing an answer or by stipulation  
6 of all the parties. Respondent has already filed an answer, and the parties have not stipulated to  
7 this action being voluntarily dismissed. Accordingly, the action may be voluntarily dismissed by  
8 court order and upon whatever terms are determined to be just. *See* Fed. R. Civ. P. 41(a)(2).

9 Here, petitioner does not unequivocally request this action be dismissed. He only  
10 requests dismissal on the condition that he will not suffer harm in some future proceeding, which  
11 in essence asks the court to decide for him. The court may not issue an advisory opinion  
12 addressing the legal ramification for voluntarily dismissing the instant action. *See United States*  
13 *Nat’l Bank v. Indep. Ins Agents of Am.*, 508 U.S. 439, 446 (1993) (holding that federal courts do  
14 not have the authority to issue advisory opinions). Because petitioner has not unequivocally  
15 sought voluntary dismissal, his current conditional request is denied. The court cannot and will  
16 not meet the condition petitioner seeks to impose on the dismissal. He may, if he wishes to do  
17 so, file an appropriate request for dismissal under Rule 41(a)(2). However, the court expresses  
18 no view whether any future claims asserted in a later filed federal petition will or will not be  
19 barred by the statute of limitations should petitioner voluntarily dismiss this action. Since  
20 petitioner request for voluntary dismissal is conditional, and the court is unable to provide  
21 petitioner with legal advice, it is recommended that petitioner’s conditional request to voluntarily  
22 withdraw the petition be denied.

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24 <sup>2</sup> Petitioner appears to be referring to the one-year limitation period for seeking federal  
25 habeas relief which begins to run from the latest of the date the judgment became final on direct  
26 review, the date on which a state-created impediment to filing is removed, the date the United  
States Supreme Court makes a new rule retroactively applicable to cases on collateral review or  
the date on which the factual predicate of a claim could have been discovered through the  
exercise of due diligence. 28 U.S.C. § 2241(d)(1).

1 **V. Motion to Amend**

2 Petitioner also seeks the court’s permission to file an amended petition that contains  
3 “procedural fact regarding the filing of the State Habeas and its pending decision(s).” Dckt. No.  
4 23 at 2. Rule 15(a)(1) provides that “[a] party may amend its pleading once as a matter of course  
5 within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading  
6 is required, 21 days after service of a responsive pleading or 21 days after service of a motion  
7 under Rule 12(b), (e), or (f), whichever is earlier.” Petitioner did not amend his petition within  
8 21 days after the answer the filed and therefore his opportunity to amend “as a matter of course”  
9 has expired. Nonetheless, Rule 15(a)(2) provides that “[i]n all other cases, a party may amend  
10 its pleading only with the opposing party's written consent or the court's leave. The court should  
11 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). When determining whether  
12 to grant leave to amend under Rule 15(a), a court should consider the following factors: (1)  
13 undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.  
14 *Foman v. Davis*, 371 U.S. 178, 182 (1962).

15 Here, it cannot be determined whether amendment would be futile. Nor can the court  
16 adequately address the other factors. Petitioner has not explained what claims, if any, he wishes  
17 to add to his petition, why they have merit, why they were not asserted earlier, and whether the  
18 addition of those claims would result in unfair prejudice or burden to the other side. He simply  
19 states that he want to amend the petition to show facts concerning his state habeas petition.  
20 Furthermore, petitioner has also failed to comply with Local Rule 139(c), which requires a party  
21 to attach a proposed amended petition to the motion to amend. Accordingly, petitioner’s motion  
22 to amend should be denied without prejudice.

23 **VI. Conclusion**

24 Accordingly, it is hereby ORDERED that:

- 25 1. Petitioner’s motion for reconsideration, Dckt. No. 22. is denied; and

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1           2. Petitioner’s motion for an extension of time, Dckt. No. 22, is granted in part to the  
2 extent that petitioner has 60 days from the date this order is served to file his traverse.

3           Further, it is RECOMMENDED that:

- 4           1. Petitioner’s motion for a stay, Dckt. No. 22, be denied,  
5           2. Petitioner’s conditional motion to voluntarily dismiss the petition, Dckt. No. 22, be  
6 denied; and  
7           3. Petitioner’s motion to amend the petition, Dckt. No. 23, be denied.

8           These findings and recommendations are submitted to the United States District Judge  
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
10 after being served with these findings and recommendations, any party may file written  
11 objections with the court and serve a copy on all parties. Such a document should be captioned  
12 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
13 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
14 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

15 Dated: March 11, 2013.

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17 EDMUND F. BRENNAN  
18 UNITED STATES MAGISTRATE JUDGE  
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