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

DARIOUS A. MAYS,

Petitioner,

No. 2:10-cv-0533 LKK KJN P

vs.

KEN CLARK, Warden,

Respondent.

ORDER

_____ /

Petitioner is a state prisoner proceeding without counsel with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On July 6, 2010, petitioner filed a motion to stay this case to allow petitioner to return to state court “to clarify certain portions of litigation.” (*Id.* at 1, citing Rhines v. Webber, 544 U.S. 269 (2005).) Respondent has filed an opposition.

The instant petition contains only exhausted claims.

A habeas petitioner may not proceed with a petition that contains both exhausted and unexhausted claims. See Rhines, 544 U.S. at 273. Consequently, petitioner may not amend his petition to add unexhausted claims. Thus, his motion to stay this action pursuant to Rhines must be denied. If petitioner, however, wishes to amend his petition in the future to include unexhausted claims that he currently is exhausting in the state courts, he can file a motion for a

1 stay of the instant proceedings while he exhausts such claims. See King v. Ryan, 564 F.3d 1133,
2 1139, 1140 (9th Cir. 2009) (holding district court may stay fully-exhausted petition while
3 petitioner returns to state court to exhaust new claims). The Ninth Circuit explained “the Kelly
4 procedure,” as follows:

5 (1) the petitioner amends his petition to delete any unexhausted
6 claims, (2) the court stays and holds in abeyance the amended, fully
7 exhausted petition, allowing petitioner the opportunity to proceed
8 to state court to exhaust the deleted claims, and (3) petitioner later
9 amends his petition and re-attaches the newly-exhausted claims to
10 the original petition.

11 King, 564 F.3d at 1135. A petitioner who elects to proceed under the Kelly procedure will be
12 able to amend his petition with his newly exhausted claims if they are timely. If a petitioner's
13 newly-exhausted claims are untimely, he will only be able to amend his petition to include them
14 if they share a “common core of operative facts” with the claims in his original petition. King,
15 564 F.3d at 1141. In this regard, the Kelly procedure, unlike the Rhines procedure, is a riskier
16 one for a habeas petitioner because it does not protect a petitioner's unexhausted claims from
17 expiring during a stay. See King, 564 F.3d at 1140-41; see also Duncan v. Walker, 533 U.S. 167,
18 172-75 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas petition
19 does not toll the statute of limitations).

20 Here, petitioner states that he “wasn’t allowed to attend the law library until 30
21 days before [his] Antiterrorism and Effective Death Penalty Act deadline was due.” (Mot. at 2.)
22 Because petitioner has refused to identify the claim or even the nature of the claim he wishes to
23 return to state court to exhaust, it is unclear whether petitioner’s statute of limitations period has
24 already expired¹ or whether he believes his claim will relate back to claims already raised in the

25 ¹ The habeas corpus statute imposes a one-year statute of limitations for filing
26 non-capital habeas corpus petitions in federal court. In most cases, the one year period will start
to run on the date on which the state court judgment became final by the conclusion of direct
review or the expiration of time for seeking direct review, although the statute of limitations is
tolled while a properly filed application for state post-conviction or other collateral review is

1 instant petition. Thus, the court will not construe the pending motion as a motion to stay under
2 King v. Ryan, but will grant petitioner leave to file such a motion if appropriate. Petitioner's
3 motion to stay this action under Rhines will be denied without prejudice.


4 On August 4, 2010, petitioner filed a motion seeking a ruling on his motion to
5 stay. In light of the instant ruling, petitioner's motion will be denied as moot.

6 Good cause appearing, IT IS HEREBY ORDERED that:

7 1. Petitioner's July 6, 2010 motion to stay under Rhines (dkt. no. 20) is denied
8 without prejudice. Petitioner may file a motion to stay pursuant to King v. Ryan, if appropriate,
9 within thirty days from the date of this order.

10 2. Petitioner's August 4, 2010 motion (dkt. no. 23) is denied.

11 DATED: August 16, 2010

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15 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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26 pending. 28 U.S.C. § 2244(d).