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

RUDY GRANT KIRBY,

Petitioner,

No. CIV S-11-0962 KJM DAD P

vs.

GREG LEWIS, Warden,

Respondent.

ORDER

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner’s second renewed motion for a stay and abeyance and second amended petition.¹

¹ On August 11, 2011, petitioner filed a renewed motion for a stay and abeyance and a first amended petition. The court reviewed petitioner’s first amended petition and observed that petitioner had only included the new claims that he had indicated he wished to exhaust in state court. The court informed petitioner that it could not stay a petition that is wholly unexhausted and advised him that in order to pursue a stay under the Rhines procedure he needed file an amended petition containing all of his claims, both exhausted and unexhausted. The court granted petitioner thirty days to file a second amended petition and instructed him that the court would address his renewed motion for a stay and abeyance after he filed that petition. As noted above, in response to the court’s order, petitioner has filed a second amended petition. He has also filed a second renewed motion for a stay and abeyance. Under these circumstances, the court will deny petitioner’s renewed motion for a stay and abeyance filed on August 11, 2011, as moot and allow the case to proceed on petitioner’s second renewed motion for a stay and abeyance filed September 23, 2011, and his second amended petition.

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Since petitioner may be entitled to relief if the claimed violation of constitutional rights is proved, respondent will be directed to file a response to petitioner’s second renewed motion for a stay and abeyance.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner’s renewed motion for a stay and abeyance (Doc. No. 15) is denied as moot;
2. Within thirty days of the date of this order, respondent shall file an opposition or a statement of non-opposition to petitioner’s second renewed motion for a stay and abeyance, filed September 23, 2011 (Doc. No. 18); and
3. Petitioner shall file a reply, if any, within fourteen days of the date of service of respondent’s opposition.

DATED: October 5, 2011.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:9
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