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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE ANOTNIO DURAN,  
Petitioner,  
v.  
SCOTT FRAUENHEIM,  
Respondent.

No. 2:17-cv-2122 KJM AC P

FINDINGS & RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. At the same time he filed his petition, petitioner also moved for a stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005). ECF No. 2. The motion was denied without prejudice because it appeared from both the petition and the motion that the petition was fully exhausted, making a Rhines stay unavailable. ECF No. 7. Petitioner was advised of his options regarding seeking a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), or amending the petition and renewing his request for a Rhines stay; he was given thirty days to file another motion for stay. Id. Petitioner proceeded to file a motion for stay under Kelly in which he states that he seeks to stay the fully exhausted petition while he pursues additional claims in the state courts which potentially make his federal petition unnecessary. ECF No. 8 at 1-2. However, petitioner also states that if he is unsuccessful in the state courts, he does not intend to amend the federal petition to add the new claims because he believes they would be

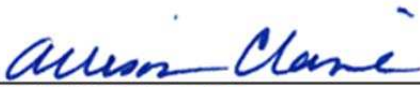
1 time-barred. Id.

2 A stay under Kelly is not permissible unless petitioner intends to add the new claims he is  
3 pursuing in state court to his federal petition, and the undersigned will therefore recommend  
4 denying the motion for stay. Petitioner is advised that in court's experience, a stay is generally  
5 unnecessary in situations such as this because his state court petition will likely be resolved  
6 before his federal petition, and if he is successful in state court, he can withdraw his federal  
7 petition at any time.

8 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's motion for stay (ECF  
9 No. 8) be denied.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
12 after being served with these findings and recommendations, petitioner may file written  
13 objections with the court and serve a copy on all parties. Such a document should be captioned  
14 "Objections to Magistrate Judge's Findings and Recommendations." Petitioner is advised that  
15 failure to file objections within the specified time may waive the right to appeal the District  
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: February 28, 2018

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19 ALLISON CLAIRE  
20 UNITED STATES MAGISTRATE JUDGE  
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