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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 third motion to stay the proceedings. ECF No. 21. His first motion for stay was filed concurrently with his petition and sought 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 given the opportunity to file another motion for stay and 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. Id. He proceeded to file a motion for stay under Kelly in which he stated that he sought to stay the fully exhausted petition while he pursued additional claims in the state courts which would potentially make his federal petition unnecessary. ECF No. 8 at 1-2. He also stated that if he was unsuccessful in the state courts, he did not intend to  
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1 amend the federal petition to add the new claims because he believed they would be time-barred.

2 Id.

3 In recommending denial of the previous motion for stay, the court advised petitioner that a  
4 stay under Kelly was not permissible unless he intended to add the new claims he was pursuing in  
5 state court to his federal petition. ECF No. 14 at 2. Petitioner's new motion for stay also states  
6 that he is seeking to pursue state court remedies and does not make any indication that he will  
7 seek to pursue those claims in this court if they are unsuccessful in state court. ECF No. 21.

8 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's motion for stay (ECF  
9 No. 21) 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, any party 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." Any response to the  
15 objections shall be filed and served within fourteen days after service of the objections. The  
16 parties are advised that failure to file objections within the specified time may waive the right to  
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: August 20, 2018

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20 ALLISON CLAIRE  
21 UNITED STATES MAGISTRATE JUDGE  
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