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**United States District Court**  
For the Northern District of California

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

MARCOS AMPARO,	)	No. C 09-0801 MMC (PR)
	)	
Petitioner,	)	<b>ORDER DENYING LEAVE TO FILE</b>
	)	<b>AMENDED PETITION; DIRECTING</b>
v.	)	<b>PETITIONER TO ELECT TO PROCEED</b>
	)	<b>WITH OR STAY PETITION; GRANTING</b>
DERRAL G. ADAMS, Warden,	)	<b>PETITIONER’S MOTION FOR COPIES;</b>
	)	<b>DIRECTIONS TO CLERK AND</b>
Respondent.	)	<b>RESPONDENT</b>
_____	)	<b>(Docket Nos. 3 &amp; 10)</b>

On February 24, 2009, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following the Court’s issuance of an order to respondent to show cause why the petition should not be granted, petitioner filed a motion to amend the petition. The proofs of service attached to petitioner’s motion and accompanying documents indicate petitioner did not serve respondent with a copy of the motion. (Docket Nos. 3, 4 & 5.) Approximately one week after petitioner filed his motion, respondent filed an answer to the petition, in which answer respondent made no reference to the motion to amend. Petitioner did not file a traverse to the petition, but has filed a motion for a copy of all documents lodged and filed in the instant action on the ground that prison officials lost all of petitioner’s legal documents. (Docket

1 No. 10.)

2 1. Motion to Amend

3 The instant petition raises four claims; respondent has not argued that any of the  
4 claims are unexhausted. In his motion to amend the petition, petitioner states that he wishes  
5 to file an amended petition containing unexhausted claims so that he may bring such claims  
6 to the Court's attention. Petitioner does not state the nature of the claims or whether he is  
7 pursuing those claims in state collateral proceedings.

8 Petitioner's motion will be denied. A habeas petitioner may not proceed with a  
9 petition that contains both exhausted and unexhausted claims. See Rhines v. Webber, 544  
10 U.S. 269, 273 (2005). Consequently, petitioner may not amend his petition to add  
11 unexhausted claims. If petitioner, however, wishes to amend his petition in the future to  
12 include unexhausted claims that he currently is exhausting in the state courts, he can file a  
13 motion for a stay of the instant proceedings while he exhausts such claims. See King v.  
14 Ryan, 564 F.3d 1133, 1139, 1140 (9th Cir. 2009) (holding district court may stay fully-  
15 exhausted petition while petitioner returns to state court to exhaust new claims).

16 Accordingly, before the instant matter may proceed further, petitioner either must  
17 (1) inform the Court that he intends to proceed only with the claims included in the petition  
18 he filed on February 24, 2009, or (2) move for a stay of the instant petition while he returns  
19 to state court to exhaust his unexhausted claims. If petitioner chooses the latter option, he  
20 must delineate the nature of the claims he will be exhausting in state court. Additionally, if  
21 the petition is stayed, petitioner must, once the claims are exhausted, amend his petition to  
22 add the newly-exhausted claims. Importantly, such amendment must take place within the  
23 one-year limitations period set forth at 28 U.S.C. § 2244(d)(1), or the newly-exhausted  
24 claims will be dismissed as untimely. King, 564 F.3d at 1140-41.

25 2. Motion for Copies

26 Petitioner moves for a copy of all documents filed in the instant action and all exhibits  
27 lodged by respondent in support of the answer to the petition. In particular, petitioner  
28 declares under penalty of perjury that all of his legal documents were lost by prison officials

1 when petitioner was transferred from Corcoran State Prison to Calipatria State Prison. Good  
2 cause appearing, petitioner's motion will be granted. Petitioner shall be provided with the  
3 above-noted documents and exhibits as set forth below.

4 **CONCLUSION**

5 For the reasons stated above, the Court orders as follows:

6 1. Petitioner's motion for leave to file an amended petition is hereby DENIED.

7 2. Within **thirty (30)** days of the date this order is filed, petitioner shall either:

8 (1) inform the Court that he intends to proceed only with the claims included in the petition  
9 he filed on February 24, 2009, or (2) move for a stay of the instant petition while he returns  
10 to state court to exhaust his unexhausted claims.

11 If petitioner fails to timely respond to this order by choosing one of the above-  
12 enumerated options, the Court will schedule a date for petitioner to file a traverse to  
13 respondent's answer to the petition that was filed on February 24, 2009.

14 3. Petitioner's motion for copies of all documents filed in the instant action and all  
15 exhibits lodged by respondent in support of the answer to the petition is hereby GRANTED.

16 Within **thirty (30)** days of the date this order is filed, respondent shall serve petitioner  
17 with copies of the answer to the petition and the lodged exhibits in support thereof.

18 Additionally, the Clerk shall send to petitioner copies of Docket Nos. 1, 2, 3, 4 and 5.

19 This order terminates Docket Nos. 3 and 10.

20 IT IS SO ORDERED.

21 DATED: August 2, 2010

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23 MAXINE M. CHESNEY  
24 United States District Judge  
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