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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DERRYL TYRONE FOSTER,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Civil No. 10cv1952 BTM (BLM)

**ORDER DENYING WITHOUT
PREJUDICE REQUEST STAY AND
ABEYANCE**

Petitioner, a state prisoner proceeding pro se, has filed a motion asking the Court to grant a stay and abeyance pursuant to *Rhines v. Webber*, 54 U.S. 269 (2005). The Court cannot grant or deny a stay in this matter because Petitioner has not yet filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Therefore, unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court. *Calderon (Nicolaus) v. United States District Court*, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996) (stating that “[u]nlike non-capital prisoners who initiate habeas proceedings by filing a petition for a writ of habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for appointment of counsel”); *McFarland v. Scott*, 512 U.S. 849 (1994). Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence of death, and there is nothing in the documents he has submitted which indicates that he is a capital prisoner.

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1 Further, the Court advises Petitioner that a one-year statute of limitations of 28 U.S.C.
2 § 2241(d)(1)(A)-(D), which provides that the limitation period shall run from the latest of:

3 (A) the date on which the judgment became final by the conclusion of
4 direct review or the expiration of the time for seeking such review;

5 (B) the date on which the impediment to filing an application created by
6 State action in violation of the Constitution or laws of the United States is
7 removed, if the applicant was prevented from filing by such State action;

8 (C) the date on which the constitutional right asserted was initially
9 recognized by the Supreme Court, if the right has been newly recognized by the
10 Supreme Court and made retroactively applicable to cases on collateral review;
11 or

12 (D) the date on which the factual predicate of the claim or claims presented
13 could have been discovered through the exercise of due diligence.

14 28 U.S.C.A. § 2244(d)(1)(A)-(D) (2008).

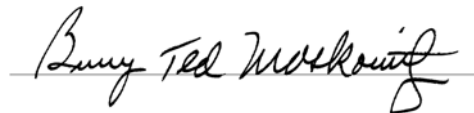
15 The statute of limitations does not run while a properly filed state habeas corpus petition
16 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
17 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
18 when its delivery and acceptance [by the appropriate court officer for placement into the record]
19 are in compliance with the applicable laws and rules governing filings.”). However, absent some
20 other basis for tolling, the statute of limitations does run while a federal habeas petition is
21 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

22 **CONCLUSION**

23 For the foregoing reasons, Petitioner’s request to stay and abey this matter is **DENIED**
24 without prejudice.

25 **IT IS SO ORDERED.**

26 DATED: October 1, 2010

27 

28 Honorable Barry Ted Moskowitz
United States District Judge