

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 12-1742-GHK (MAN)

Date: May 1, 2012

Title: Jens Majano v. Tim Virga

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DOCKET ENTRY: ORDER TO SHOW CAUSE RE: DISMISSAL FOR LACK OF EXHAUSTION

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PRESENT:

Hon. Margaret A. Nagle, United States Magistrate Judge

Earlene Carson
Deputy Clerk

N/A
Court Reporter/Tape No.

ATTORNEYS PRESENT FOR PETITIONER:

ATTORNEYS PRESENT FOR RESPONDENTS:

N/A

N/A

PROCEEDINGS (In Chambers):

On February 29, 2012, a 28 U.S.C. § 2254 habeas petition submitted by Petitioner was filed in this district ("Petition"). Petitioner represented, under oath, that: he filed a petition for review in the California Supreme Court in Case No. S189196, in which he presented the claims alleged in the Petition; and his petition for review was denied on March 2, 2011. (Petition at 3, 7.) Based on that representation, the Petition appeared to be exhausted and timely, and thus, the Court ordered that the Petition be served on Respondent.

The Court now is in receipt of Respondent's motion to dismiss the Petition filed on April 25, 2012 ("Motion") and related lodgment of the state record ("Lodg."). In the Motion, Respondent argues that the Petition is: untimely, because it was filed approximately two months after Petitioner's limitations period expired; and fully unexhausted, because Petitioner did not file a petition for review in the California Supreme Court.

The record shows that Petitioner was jointly tried and convicted with three co-defendants -- Jose L. Guevara, David Monterrosa, and Larry Navarette. (Lodg. No. 2 at 2.) Petitioner and his three co-defendants, each represented by separate appellate counsel, appealed to the California Court of Appeal, and on November 15, 2010, in a single decision, the California Court of Appeal affirmed the judgments against all four. (Lodg. No. 2.) Pursuant to Rule 8.500 of the California Rules of Court, Petitioner and his co-defendants had until December 25, 2010, in which to seek review in the California Supreme Court. On December 23, 2010, co-defendants Guevara and Monterrosa filed separate petitions for review in Case No. S189196. On December 27, 2010, the first court day after the Christmas holiday period, co-defendant

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Navarette filed a petition for review in Case No. S189196. (Lodg. No. 3.) The Court has examined the copy of the docket for California Supreme Case No. S189196 lodged by Respondent (Lodg. No. 3) and, pursuant to Rule 201 of the Federal Rules of Evidence, has taken judicial notice of the docket information regarding Case No. S189196, which is available at <http://appellatecases.courtinfo.ca.gov>. These public records indicate that Petitioner did *not* file a petition for review in Case No. S189186.

If Petitioner did not file a petition for review in the California Supreme Court, the Petition is fully unexhausted and must be dismissed summarily.¹ If, however, the docket for Case No. S189196 is incorrect and Petitioner *did* file a petition for review, the Petition may be exhausted and would be timely.

Accordingly, if Petitioner wishes this action to proceed, he must submit competent proof, **by no later than May 31, 2012**, that he did, in fact, file a petition for review in the California Supreme Court that has been resolved by the state high court. In particular, Petitioner must submit a copy of that petition for review and the California Supreme Court order denying it. If Petitioner did not file a petition for review, this action must be dismissed, and Petitioner may wish to expedite matters by filing a voluntary dismissal. The Clerk is directed to send to Petitioner, along with this Order, Form CV-09 (Notice of Dismissal Pursuant to Federal Rules of Civil Procedure 41(a) or (c)), with the case caption information filled-out on the form. If Petitioner wishes to voluntarily dismiss this action, he should check the first box on this form, sign and date the form, and send the form to the court for filing by the May 31, 2012 deadline, which will result in this action being dismissed without prejudice.

Petitioner is cautioned that a failure to comply with this Order the May 31, 2012 deadline will cause the Court to: presume that Petitioner did not file a petition for review with the California Supreme Court, and the Petition, therefore, is unexhausted; and recommend that this action be summarily dismissed for lack of exhaustion.

IT IS SO ORDERED.

¹ In addition, if no petition for review was filed by Petitioner, his one-year limitations period commenced running on December 26, 2010, and expired on December 25, 2011, approximately two months before the Petition was filed. Thus, the Petition appears to be untimely as well as unexhausted.