

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-07248-DOC (DFM)	Date	June 7, 2016
Title	Ernest Christopher Moore v. L.S. McEwen		

Present: The Honorable Douglas F. McCormick

Nancy Boehme
Deputy Clerk

n/a

Court Reporter / Recorder

Attorney(s) Present for Plaintiffs:

Attorney(s) Present for Defendants:

n/a

n/a

Proceedings: (In Chambers) Order to Show Cause

This Court granted Petitioner's request for a Kelly stay on February 25, 2013 in order to allow Petitioner to exhaust Ground Two of his Petition. After more than three years, Petitioner has failed to commence exhaustion procedures and has not presented his claim to the California Supreme Court.

On February 16, 2016, this Court ordered Petitioner to show cause in writing within thirty (30) days why the Kelly stay ordered in 2013 should not be vacated to allow this case to proceed to the merits on Ground One of the Petition. Dkt. 36. This Court noted that the order granting Petitioner a Kelly stay in 2013 informed Petitioner that he must exhaust his state remedies with respect to Ground Two "diligently" and "expeditiously." See Dkt. 17 at 6.

Petitioner filed a response on March 2, 2016 in which he states that he continues to make requests for evidence. Dkt. 37 at 1-2. He also notes that the California Innocence Project is in the process of investigating his case. Id. However, Petitioner fails to explain why the Innocence Project investigation prevents him from exhausting his claim in state court. Petitioner also fails to give cause for why he waited to send a letter requesting evidence to the Los Angeles District Attorney's Office until February 6, 2016, almost three years after the stay was granted.

Petitioner has failed to meet a condition of the stay by not exhausting his state remedies "diligently" and "expeditiously" and therefore it would be appropriate for this Court to dismiss Ground Two of the Petition. See Mendoza v. Beard, No. 98-02150, 2015 WL 1671498, at * 2 (E.D. Cal. Apr. 14, 2015) (holding that a federal habeas petition can be dismissed in its entirety for failure to prosecute a state exhaustion proceeding); see also Calhoun v. Bergh, 768 F.3d 409, 411 (6th Cir. 2014) (holding that dismissal was appropriate because petitioner failed to meet the condition of the stay requiring him to promptly file his unexhausted claim in state court). However, the Court believes a less drastic alternative is appropriate at this time.

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Accordingly, the Court ORDERS Petitioner to show proof within ninety (90) days of this order that he has commenced exhaustion proceedings in the California Supreme Court. If Petitioner fails to do so, the Court may vacate the Kelly stay ordered in 2013 and allow this case to proceed on the merits on Ground One of the Petition.

Initials of Clerk

nkb
