

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-07842-R (AS)	Date	April 21, 2016
Title	<u>Jose Armando Algire v. Tim Perez, Warden</u>		

Present: The Honorable	Alka Sagar, United States Magistrate Judge		
	Alma Felix		N/A
	Deputy Clerk		Court Reporter / Recorder
	Attorneys Present for Petitioner:		Attorneys Present for Respondent:
	N/A		N/A

Proceedings: (IN CHAMBERS) ORDER RE FOUR OPTIONS

On October 6, 2015, Jose Armando Algire (“Petitioner”), represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition”). (Docket Entry No. 1). The Petition asserts the following grounds for federal habeas relief:

- (1) “Trial court violated [P]etitioner’s due process rights by admitting a secretly-made recording despite statutory ban on admitting such evidence;”
- (2) “Court of Appeal violated [Pe]titioner’s due process right by retroactively applying a new interpretation of Cal. Pen. Code § 632 based on fact it had been re-enacted without change;”
- (3) “Court of Appeal violated U.S. Constitution’s ex post facto clause by retroactively imposing new interpretation of key statute [Cal. Pen. Code § 632];”
- (4) Trial court violated [P]etitioner’s due process rights by excluding his expert’s transcript of inaudible portions of recording but admitting prosecutor’s unsupported transcript;” and
- (5) Petitioner received ineffective assistance of counsel based on his trial counsel’s failure to (a) “interview witnesses who could have bolstered his case and/or impeached the complaining witness’s accusations,” (b) call some witnesses to testify at trial, and (c) to ask crucial questions to a witness who testified at trial; and his appellate counsel’s failure to raise the ineffective assistance of trial counsel claim and “other issues” on appeal. (Petition at 5-6).

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On March 2, 2016 (following the district court’s issuance of an Order Denying Stay Under Rhines, Docket Entry No. 19), Respondent filed a Motion to Dismiss the Petition (“Motion to Dismiss”) (Docket Entry No. 21), contending that all claims alleged in the Petition are unexhausted. Respondent specifically contends that Ground One is unexhausted because the due process language was not included in that claim on direct appeal to the California Court of Appeal, and therefore “Petitioner submitted a new claim to the [California Supreme Court] in a procedural context in which its merits would not be considered” (see Motion to Dismiss at 4, 6-9, citing to Castille v. Peoples, 489 U.S. 346, 351(1989),¹ and that Grounds Two through Five are unexhausted because they have not been presented to the California Supreme Court (see Motion to Dismiss at 4, 9-11).

Petitioner did not file an Opposition to the Motion to Dismiss, or request an extension of time to do so.

A state prisoner must exhaust his state court remedies before a federal court may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1)(A); O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). To satisfy the exhaustion requirement, a habeas petitioner must “fairly present” his federal claims in the state courts in order to give the state the opportunity to pass upon and correct alleged violations of the petitioner’s federal rights. Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam). A petitioner must present his claims to the highest court with jurisdiction to consider them (typically the state supreme court), or demonstrate that no state remedy is available. See Peterson v. Lampert, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). The fair presentation requirement is not met if the state’s highest court does not reach the merits of a claim due to the procedural context in which it was presented. See Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994) (“Submitting a new claim to the state’s highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation.”) (citing Castille v. Peoples, *supra*); Harris v. Superior Court, 500 F.2d 1124,

¹ In the Order Denying Stay Under Rhines, the Court stated: “[I]t appears to the Court, without deciding the matter, that Ground One of the Petition was presented to the California Supreme Court in Petitioner’s Petition for Review (see Respondent’s Notice of Lodging No. 6 at 3, 5-6, 27-31) and therefore is exhausted.” (Docket Entry No. 19 at 4). The Court now decides this issue.

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1126-28 (9th Cir. 1974) (a claim denied by the state’s highest court as procedurally deficient, either explicitly or by citation of authority, does not exhaust the claim).

Ground One of the Petition was presented to the California Supreme Court in Petitioner’s Petition for Review. (See Respondent’s Notice of Lodging [“Lodgment”] No. 6 at 3, 5-6, 27-31). Since the California Supreme Court summarily denied the Petition without citation to authority, the Court finds that Ground One of the Petition was fairly presented to the California Supreme Court and therefore is exhausted. See Harris v. Superior Court, supra, 500 F.2d at 1128-29 (“[W]hen the California Supreme Court denied a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied.”) (citing Brown v. Allen, 344 U.S. 443, 449 n.3 (1953)).

However, Ground Two (alleging a violation of due process, as opposed to a violation of the doctrine of separation of powers), as well as Grounds Three, Four, and Five of the Petition have not been presented to the California Supreme Court (see Lodgment No. 6; Petition at 9-10 [admitting that Grounds Three through Five had not been raised in a Petition for Review or in a habeas petition to the California Supreme Court]; see also <http://appellatecases.courtinfo.ca.gov> [last visited April 21, 2016]), and consequently are unexhausted.

Therefore, Petitioner has put forth unexhausted claims that make his Petition a mixed petition, subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 522 (1982) (“In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner’s right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.”). Yet, a court may not dismiss a mixed petition without first providing the petitioner the opportunity to amend the pleading to delete any unexhausted claims. Jefferson v. Budge, 419 F.3d 1013, 1015-16 (9th Cir. 2005) (citing, inter alia, Rose, 455 U.S. at 510).

Petitioner may request a dismissal of the entire Petition without prejudice. However, Petitioner is cautioned that dismissal of the present proceeding (even dismissal “without prejudice”) might contribute toward a statute of limitations bar against a federal petition

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subsequently filed by Petitioner.² Although 28 U.S.C. § 2244(d)(2) tolls the statute of limitations during the pendency of “a properly filed application for State post-conviction or other collateral review,” the statute of limitations **will not be tolled** during the pendency of the instant Petition. See Duncan v. Walker, 533 U.S. 167, 181–82 (2001).

Additionally, in “limited circumstances,” a district court has discretion to stay and hold in abeyance a mixed habeas corpus petition pending exhaustion of state remedies. Rhines v. Weber, 544 U.S. 269, 277-78 (2005). Stay and abeyance is “only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.” Id. at 277; see also Jackson v. Roe, 425 F.3d 654, 660-61 (9th Cir. 2005). Under Rhines, “it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines, 544 U.S. at 278.

Prior to Rhines, in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007) (“Kelly”), the Ninth Circuit held that a district court has discretion to allow a petitioner to amend a mixed petition to delete any unexhausted claims, stay the fully exhausted petition pending exhaustion of the unexhausted claims, and then allow the petitioner to amend the petition to include the newly exhausted claims. See id. at 1070-71; see also Olvera v. Giurbino, 371 F.3d 569, 573-74 (9th Cir. 2004). In King v. Ryan, 564 F.3d 1133 (9th Cir. 2009), the Ninth Circuit held that the Kelly procedure remains an option after Rhines, and that the propriety of a Kelly stay does not depend on a showing of good cause for the failure to exhaust. Id. at 1143. A Kelly stay “is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year

² Although the statute of limitations is also subject to equitable tolling “in appropriate cases,” Holland v. Florida, 560 U.S. 631, 645 (2010), this Court need not, and does not, now determine whether equitable tolling might apply with respect to a federal petition that Petitioner subsequently might file. Nor does the Court express any opinion concerning the merits of any petition that Petitioner may file in the California Supreme Court, noting that even if there exists an applicable state procedural bar, the California Supreme Court nevertheless might choose to reach the merits of Petitioner’s claims. See, e.g., Park v. California, 202 F.3d 1146, 1153-54 (9th Cir. 2000).

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limitation period imposed by [28 U.S.C. § 2244(d)].” Kelly, 315 F.3d at 1070. However, a petitioner’s invocation of Kelly is subject to the requirement that once the petitioner has fairly presented his now exhausted claim(s), the newly exhausted (and possibly otherwise time-barred) claim(s) must “share[] a ‘common core of operative facts’ with the [exhausted] claims in the pending petition.” King, 546 F.3d at 1141 (quoting Mayle v. Felix, 545 U.S. 644, 659 (2005)). However, a claim in an amended petition does not relate back “when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.” Hebner v. McGrath, 543 F.3d 1133, 1138 (9th Cir. 2008); see Mayle, 545 U.S. at 660-61.

Accordingly, the Court will afford Petitioner the opportunity to address the defects discussed herein which preclude the consideration of the Petition by the Court. He may specify where the allegedly unexhausted claims (Grounds Two through Five), as identified above, were presented to the California Supreme Court; he may voluntarily dismiss the Petition; he may dismiss the unexhausted claims (Grounds Two through Five) and proceed on only the exhausted claim (Ground One); or he may request a stay, under Kelly, of his fully exhausted claim pending the exhaustion of the unexhausted claims.³

Thus, Petitioner has the following four options:

Option 1: If Petitioner contends that Grounds Two through Five of the Petition, as identified above, are exhausted, he must file a Response specifying the exact page and lines of the California Supreme Court pleading on which those claims were alleged. Petitioner’s Response is due within 10 days of the date of this Minute Order (by no later than **May 2, 2016**). The absence of a Response will be deemed an admission by Petitioner that he has failed to exhaust Grounds Two through Five of the Petition, as identified above.

Option 2: Petitioner may request a voluntary dismissal of this action without prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **A Notice of Dismissal form is attached for Petitioner’s convenience.** If Petitioner elects this option, he must file the

³ Since the Court has already denied Petitioner’s Motion for a Stay of the Petition Under Rhines, the Court will not permit Petitioner the option of seeking a stay of the Petition under Rhines.

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Notice of Dismissal within 20 days of the date of this Minute Order (by no later than **May 11, 2016**). Petitioner is advised that any dismissed claims may later be subject to the statute of limitations under 28 U.S.C. § 2244(d)(1): “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”

Option 3: Petitioner may request a voluntary dismissal of the unexhausted claims alleged in the Petition (Grounds Two through Five), as identified above, and elect to proceed on only the exhausted claim (Ground One). If Petitioner elects this option, he must file a notice of withdrawal of the unexhausted claims alleged in the Petition (Grounds Two through Five), as identified above, within 20 days of the date of this Minute Order (by no later than **May 11, 2016**). Petitioner is advised that if he elects to proceed solely with the exhausted claim (Ground One), the Court will not later rule on the unexhausted claims alleged in the Petition (Grounds Two through Five), as identified above, even if Petitioner subsequently does exhaust those issues in review by the California Supreme Court. Petitioner is further advised that if he elects to proceed solely with the exhausted claim (Ground One), any future habeas petition containing his unexhausted claims or other claims that could have been raised in the instant Petition (but were not) may be rejected as successive.

Option 4: Petitioner may dismiss the unexhausted claims alleged in the Petition (Grounds Two through Five), as identified above, and, pursuant to Kelly v. Small, supra, file a motion seeking a stay of his remaining exhausted claim while Petitioner returns to the state courts to exhaust the dismissed claims. If Petitioner elects this option, he must file a declaration, signed under penalty of perjury, selecting a stay pursuant to Kelly,⁴ within 20 days of the date of this Minute Order (by **May 11, 2016**). Petitioner is warned, however, that after he has exhausted the unexhausted claims in state court, he will be able to amend his Petition to add the newly exhausted claims only if the exhausted claim (i.e., Ground

⁴ The Court expresses no view regarding whether Petitioner would be entitled to a stay under the standards set forth in Kelly. The Court also expresses no view regarding the timeliness of the Petition or the merits of the claim raised therein.

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CASE NUMBER

v.
Plaintiff(s),

Defendant(s).

**NOTICE OF DISMISSAL PURSUANT
TO FEDERAL RULES OF CIVIL
PROCEDURE 41(a) or (c)**

PLEASE TAKE NOTICE: (*Check one*)

- This action is dismissed by the Plaintiff(s) in its entirety.
- The Counterclaim brought by Claimant(s) _____ is dismissed by Claimant(s) in its entirety.
- The Cross-Claim brought by Claimants(s) _____ is dismissed by the Claimant(s) in its entirety.
- The Third-party Claim brought by Claimant(s) _____ is dismissed by the Claimant(s) in its entirety.
- ONLY** Defendant(s) _____

_____ is/are dismissed from (*check one*) Complaint, Counterclaim, Cross-claim, Third-Party Claim brought by _____.

The dismissal is made pursuant to F.R.Civ.P. 41(a) or (c).

Date

Signature of Attorney/Party

NOTE: F.R.Civ.P. 41(a): This notice may be filed at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

F.R.Civ.P. 41(c): Counterclaims, cross-claims & third-party claims may be dismissed before service of a responsive pleading or prior to the beginning of trial.