

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-7868-BRO (AS)	Date	August 4, 2017
Title	<u>Jose A. Barrios v. Warren L. Montgomery, Warden</u>		

Present: The Honorable	Alka Sagar, United States Magistrate Judge
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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 TO SHOW CAUSE

On October 7, 2015, Jose A. Barrios (“Petitioner”) 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).

On July 25, 2016 (following the filings of Respondent’s Motion to Dismiss the Petition and Petitioner’s Opposition to the Motion to Dismiss the Petition, Docket Entry Nos. 20, 25), the Court issued a Minute Order requiring Petitioner to select one of four options, because Ground Two alleged in the Petition (i.e., Petitioner received ineffective assistance of counsel based on his trial counsel’s “failure to object to irrelevant drug use admitted evidence”, see Petition at 5, Attachment at 5c) was unexhausted. (Docket Entry No. 26). Specifically, the Court ordered Petitioner to either: (1) voluntarily dismiss the entire action without prejudice; (2) voluntarily dismiss Ground Two of the Petition and proceed only the exhausted claims; (3) request a stay of the Petition, pursuant to Rhines v. Weber, 544 U.S. 269, 277-78 (2005), while he returns to state court to exhaust his unexhausted claim; or (4) dismiss Ground Two of the Petition, and pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002) (“Kelly”), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007), file a motion seeking a stay of his exhausted claims while he returns to the state court to exhaust his unexhausted claim. Id. at 4-5.

On July 6, 2017, Petitioner filed a “Motion for Stay and Abeyance[:] Response to Order to Show Cause” (“Motion for a Stay”) (Docket Entry No. 46), an election corresponding to Option 3 of the Court’s July 25, 2016 Minute Order.

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On July 7, 2017, the Court issued an Order denying Petitioner's Motion for a Stay, and ordering Petitioner, by July 24, 2017, to select Option 1, 2 or 4 of the Court's July 25, 2016 Minute Order. (Docket Entry No. 47). Petitioner was expressly warned that his failure to file a timely response to the Court's July 7, 2017 Order might result in a recommendation that this action be dismissed with prejudice for his failure to prosecute and/or obey Court orders pursuant to Fed.R.Civ.P. 41(b). Id. at 2. Petitioner further was expressly warned that his failure to select one of the three options identified in the Court's July 25, 2016 Minute Order might result in the dismissal of the Petition as a mixed petition. Id.

As of today's date, Petitioner has failed to file a Response to the Court's July 7, 2017 Order.

Accordingly, Petitioner is **HEREBY ORDERED TO SHOW CAUSE why this action should not be dismissed as a mixed petition**, pursuant to Rose v. Lundy, 455 U.S. 509, 522 (1982).

Petitioner may file a response to this Order by availing himself of one of the three remaining options set forth in the Court's July 25, 2016 Minute Order: (1) voluntary dismissal of the entire action without prejudice; (2) voluntary dismissal of the unexhausted claim, as identified above, and proceeding on the exhausted claims; or (3) dismissal of the unexhausted claim, as identified above, and pursuant to Kelly, move for a stay of this action.

Information regarding the requirements for, and potential consequences of, each of these options are explained in the Court's July 25, 2016 Minute Order, a copy of which is attached.

Petitioner must file a response to this Order within twenty (20) days of the date of this Order (by no later than **August 24, 2017**).

Petitioner is warned that failure to comply with this Order will result in a recommendation that this action be dismissed with prejudice for his failure to prosecute and/or comply with Court orders pursuant to Fed.R.Civ.P. 41(b) and/or dismissal without prejudice as a mixed petition.