

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-7868-BRO (AS)	Date	July 25, 2016
Title	<u>Jose A. Barrios v. Warren L. Montgomery, 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)		

On October 7, 2015, Jose A. Barrios (“Petitioner”), proceeding pro se, 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 April 21, 2016, Respondent filed a Motion to Dismiss the Petition, contending that Ground Two of the Petition (alleging that 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) is unexhausted and therefore the Petition is a “mixed petition.” (Docket Entry No. 20).

On July 22, 2016, Petitioner filed an Opposition to the Motion to Dismiss the Petition (“Opposition”). (Docket Entry No. 25).¹

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

¹ Petitioner’s filing of the Opposition DISCHARGES the Order to Show Cause issued on June 30, 2016. (See Docket Entry No. 24).

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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).

Although Petitioner contends he alleged a claim corresponding to Ground Two of the instant Petition in his Petition for Review to the California Supreme Court (see Opposition, citing Respondent’s Notice of Lodgment No. 7 at 18 [“Trial Counsel Provided Ineffective Assistance of Counsel by Failing to Make Sufficient Objections to Preserve All the Changes Raised on Appeal”]), the ineffective assistance of trial counsel claim raised in the Petition for Review does not correspond to Ground Two of the Petition. Rather, that claim alleged that Petitioner’s trial counsel was ineffective for failing to raise on appeal certain claims, which did *not* include a claim concerning the admission of evidence of drug use. (See Lodgment No. 7 at 19-22, No. 6 at 9-10, 17 [portions of the California Court of Appeal Opinion to which Petitioner cited in his Petition for Review]).

It appears to the Court that Ground Two of the Petition has not been presented to the California Supreme Court (see Lodgment No. 7), and is consequently unexhausted. Therefore, Petitioner has put forth unexhausted claims that make his Petition, on its face, 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. The Court observes, however, that dismissal of the present proceeding (even dismissal “without prejudice”) might contribute toward a statute of limitations bar against a federal petition subsequently filed by Petitioner.² Although 28 U.S.C. § 2244(d)(2) tolls the statute of

² 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

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limitations during the pendency of “a properly filed application for State post-conviction or other collateral review,” the statute of limitations would not have been 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 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, that newly exhausted (and possibly otherwise time-barred) claim must “share[] a ‘common core of operative facts’ with the claims in the pending petition.” King, 546 F.3d at 1141 (quoting Mayle v. Felix, 545 U.S. 644, 659

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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(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 voluntarily dismiss the Petition; he may dismiss the exhausted claim and proceed on only the exhausted claims; or he may request a stay of the mixed Petition under Rhines, or request a stay, under Kelly, of his fully exhausted claims pending the exhaustion of the unexhausted claim.

Thus, Petitioner has the following four options:

Option 1: 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 Notice of Dismissal within 20 days of the date of this Minute Order (by no later than **August 15, 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 2: Petitioner may request a voluntary dismissal of the unexhausted claim alleged in the Petition, as identified above, and elect to proceed on only the exhausted claims. If Petitioner elects this option, he must file a notice of withdrawal of the unexhausted claim alleged in the Petition, as identified above, within 20 days of the date of this Minute Order (by no later than **August 15, 2016**). Petitioner is advised that if he elects to proceed solely with the exhausted claims, the Court will not later rule on the unexhausted claim alleged in the Petition, as identified above, even if Petitioner subsequently does exhaust that issue in review by the California Supreme Court. Petitioner is further advised that if he elects to proceed solely with the exhausted claims, any future habeas petition containing his unexhausted claim or other claims that could have been raised in the instant Petition (but were not) may be rejected as successive.

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Option 3: Petitioner may file a motion for a stay, pursuant to Rhines, *supra*, seeking a stay of the exhausted claims while he returns to the state courts to exhaust the unexhausted claim in his Petition, as identified above. To obtain a stay pursuant to Rhines, Petitioner is required to make a showing of good cause for his failure to have exhausted all of his claims in state court and that the claims are not plainly meritless. *See id.* If Petitioner elects this option, he must file a declaration, signed under penalty of perjury, selecting a stay pursuant to Rhines,³ within 20 days of the date of this Minute Order (by no later than **August 15, 2016**). (In the motion, Petitioner should select a backup option, in the event the Court finds that Petitioner has failed to establish good cause for his failure to exhaust the unexhausted claim alleged in the Petition, as identified above.)

Option 4: Petitioner may dismiss the unexhausted claim alleged in the Petition, as identified above, and, pursuant to Kelly v. Small, *supra*, file a motion seeking a stay of his remaining exhausted claims while Petitioner returns to the state courts to exhaust the dismissed claim. 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 **August 15, 2016**). Petitioner is warned, however, that after he has exhausted the unexhausted claim in state court, he will be able to amend his Petition to add the newly exhausted claim only if the exhausted claims in the Petition are timely and the newly exhausted claim “relat[es] back” to the exhausted claims in the Petition. King v. Ryan, *supra*, 564 F.3d at 1140-41; Mayle v. Felix, *supra*, 545 U.S. at 664.

Petitioner is expressly warned that failure to timely file a response to this ORDER may result in a recommendation that this action be dismissed with prejudice for his failure to prosecute and/or obey Court orders pursuant to Federal Rule of Civil

³ The Court expresses no view regarding whether Petitioner would be entitled to a stay under the standards set forth in Rhines. The Court also expresses no view regarding the timeliness of the Petition or the merits of the claim raised therein.

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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Procedure 41(b).

Petitioner is further warned that if he does not select one of the four options within the time frames specified above, the Petition will be subject to dismissal as mixed.

Initials of _____ 0 : 0
Preparer AF _____

UNITED STATES DISTRICT COURT
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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.*