

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	CV 16-09551-JFW (AS)	Date	January 4, 2017
Title	<u>Dennis Petillo, Jr. v. Patrice Silverman</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		

On December 27, 2016, Dennis Petillo, Jr. (“Petitioner”), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus (“Petition”). (Docket Entry No. 1).<sup>1</sup> The Petition, in at least two separate claims, appears to assert the following ground for federal habeas relief: Petitioner has been harassed and tortured, in violation of the cruel and unusual punishment clause of the Eighth Amendment. (See Petition at 3-4, Attachment at 1-2).

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

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<sup>1</sup> On the same date, Petitioner filed two motions: (1) a “Motion of Restrain Order Fourm Document Paperuis” (Docket Entry No. 2); and (2) a Motion Requesting a Police Report (Docket Entry No. 3). Since the issues addressed in this Order may render the motions moot, the motions are DENIED without prejudice.

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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.”); Harris v. Superior Court, 500 F.2d 1124, 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).

Here, as Petitioner concedes (see Petition at 5), he has failed to present the sole ground alleged in the Petition to the California Supreme Court. See also <http://appellatecases.courtinfo.ca.gov> [last visited January 4, 2017]). Therefore, the Petition is totally unexhausted, subject to dismissal.

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 subsequently filed by Petitioner.<sup>2</sup> 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, a district court has the authority to stay and hold in abeyance a totally unexhausted habeas corpus petition. See Mena v. Long, 813 F.3d 907, 912 (9th Cir. 2016) (“In sum, we hold that a district court has the discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines [v. Weber]*, 544 U.S. 269 (2005)].”). Under Rhines, 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).

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<sup>2</sup> 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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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.

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, or he may request a stay of the Petition under Rhines.

Thus, Petitioner has the following two 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 Order (by no later than **January 24, 2017**). 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 file a motion for a stay, pursuant to Rhines, 544 U.S. at 277-78, seeking a stay of the Petition while he returns to the state courts to exhaust unexhausted claims. 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,<sup>3</sup> within 20 days of the date of this Minute Order (by no later than **January 24, 2017**).

**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**

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<sup>3</sup> 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.

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for his failure to prosecute and/or obey Court orders pursuant to Federal Rule of Civil Procedure 41(b).

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

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