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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | | |
|------------------------|---|--------------------------------|
| ESTEBAN D. HERNANDEZ, |) | 1:10-cv-01026-AWI-JLT HC |
| |) | |
| Petitioner, |) | ORDER GRANTING PETITIONER’S |
| |) | MOTION TO WITHDRAW UNEXHAUSTED |
| v. |) | CLAIMS TWO, THREE, AND FOUR |
| |) | (Doc. 22) |
| |) | |
| CATHY ALLISON, Warden, |) | |
| |) | |
| Respondent. |) | |

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

On June 7, 2010, Petitioner filed the instant petition for writ of habeas corpus in this Court raising four claims: (1) that Petitioner’s constitutional right to a jury trial was violated when consecutive sentences were imposed; (2) that the second-degree murder conviction should be set aside because insufficient evidence of implied malice was presented at the preliminary hearing; (3) the “mere” fact that Petitioner was driving a motor vehicle while under the influence of alcohol was insufficient evidence of gross vehicular manslaughter at the preliminary hearing; and (4) that the information must be set aside because each element of the charged offenses was not established at the preliminary hearing. (Doc. 1, pp. 5-10; 15).

1 On July 2, 2010, the Court ordered Respondent to file a response to the petition. (Doc. 5).
2 On October 12, 2010, Respondent filed the instant motion to dismiss, contending that Petitioner had
3 exhausted only the first claim in state court and therefore either Petitioner should withdraw the
4 unexhausted claims or the petition should be dismissed. (Doc. 14). On December 2, 2010, the Court
5 issued Findings and Recommendations to grant Respondent's motion to dismiss. (Doc. 17). On
6 January 11, 2011, with no objections having been filed, the District Judge adopted the Findings and
7 Recommendations, granted the motion to dismiss, and ordered that Petitioner file a motion
8 voluntarily withdrawing the three unexhausted claims within thirty days or risk having the entire
9 petition dismissed as a mixed petition. (Doc. 18). On February 7, 2011, Petitioner filed a motion to
10 stay proceedings while he exhausts the three unexhausted claims in state court. (Doc. 19). On
11 February 28, 2011, Respondent filed an opposition, arguing that any newly exhausted claims would
12 be untimely, that Petitioner had not acted with diligence in this case, and that, in any event, the
13 unexhausted claims are clearly without merit and raise only issues of state law. (Doc. 20).

14 On May 20, 2011, the Court denied Petitioner's motion for stay, finding that the three
15 unexhausted claims, which raised issues of state law only, did not allege cognizable federal habeas
16 claims. (Doc. 21). On June 8, 2008, Petitioner filed the instant motion to withdraw claims two,
17 three, and four as unexhausted and to proceed on claim one. (Doc. 22).

18 Because the three claims that Petitioner seeks to withdraw are in fact unexhausted, and
19 because the Court has already determined that the claims would be meritless because they raise only
20 issues of state law, the Court will grant Petitioner's motion.

21 **ORDER**

22 Accordingly, IT IS HEREBY ORDERED as follows:

- 23 1. Petitioner's motion with withdraw grounds two, three, and four (Doc. 22), is
24 GRANTED.

25
26 IT IS SO ORDERED.

27 Dated: June 10, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE