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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES BOOTS FLORES,

1:11-CV-00190 BAM HC

Petitioner,

ORDER TERMINATING STAY
[Doc. #16]

v.

ORDER REQUIRING RESPONDENT TO FILE
RESPONSE

MICHAEL STAINER, Warden,

ORDER SETTING BRIEFING SCHEDULE

Respondent.

_____ /

Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The parties have consented to the jurisdiction of the magistrate judge pursuant to 28 U.S.C. § 636(c).

Petitioner challenges his 2008 conviction in Fresno County Superior Court for corporal injury on a child resulting in a traumatic condition. Petitioner appealed his conviction to the California Court of Appeal, Fifth Appellate District. The judgment was affirmed on February 10, 2010. He then filed a petition for review in the California Supreme Court. The petition was summarily denied on June 9, 2010.

On February 3, 2011, Petitioner filed a federal habeas petition in this Court. On May 19, 2011, Respondent filed a motion to dismiss the petition as a mixed petition containing exhausted and

1 unexhausted claims. On August 4, 2011, the Court DISMISSED the motion to dismiss and
2 GRANTED a stay of the proceedings pending Petitioner’s return to state court to exhaust state
3 remedies.

4 On February 16, 2012, Petitioner filed an amended petition with the Court in compliance
5 with the Court’s August 4 Order. The Court has conducted a preliminary review of the Petition.
6 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules of
7 Civil Procedure,¹ the Court HEREBY ORDERS:

8 1. Respondent SHALL FILE a RESPONSE to the Petition² within **SIXTY (60) days** of the
9 date of service of this order. See Rule 4, Rules Governing Section 2254 Cases; Cluchette
10 v. Rushen, 770 F.2d 1469, 1473-1474 (9th Cir. 1985) (court has discretion to fix time for
11 filing a response). A Response can be made by filing one of the following:

12 A. AN ANSWER addressing the merits of the Petition. Respondent SHALL INCLUDE
13 with the Answer any and all transcripts or other documents necessary for the
14 resolution of the issues presented in the Petition. See Rule 5(c), Rules Governing
15 Section 2254 Cases. Any argument by Respondent that Petitioner has *procedurally*
16 *defaulted* a claim SHALL BE MADE in the ANSWER, but must also address the
17 merits of the claim asserted.

18 B. A MOTION TO DISMISS the Petition. A Motion to Dismiss SHALL INCLUDE
19 copies of all Petitioner’s state court filings and dispositive rulings. See Rule 5(c),
20 Rules Governing Section 2254 Cases.³

21
22 ¹The Federal Rules of Civil Procedure “apply to proceedings for habeas corpus ... to the extent that the practice in
23 those proceedings (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing
24 Section 2255 Cases; and (B) has previously conformed to the practice in civil actions.” Fed.R.Civ.P. 81(a)(4). Rule 12 also
provides “[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or
these rules, may be applied to a proceeding under these rules.” Rule 12, Rules Governing Section 2254 Cases.

25 ²Respondent is advised that a scanned copy of the Petition is available in the Court’s electronic case filing system
26 (“CM/ECF”).

27 ³Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court’s determination that summary
28 dismissal is inappropriate, the “judge must order the respondent to file an answer, motion, or other response. . . .” Rule 4,
Rules Governing Section 2254 Cases; see also Advisory Committee Notes to Rule 4 and 5 of Rules Governing Section 2254
Cases (stating that a dismissal may obviate the need for filing an answer on the substantive merits of the petition and that the
Attorney General may file a Motion to Dismiss for failure to exhaust.); White v. Lewis, 874 F.2d 599, 60203 (9th Cir. 1989)

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2. If Respondent files an Answer to the Petition, Petitioner MAY FILE a Traverse within **THIRTY (30) days** of the date Respondent's Answer is filed with the Court. If no Traverse is filed, the Petition and Answer are deemed submitted at the expiration of the thirty days.
3. If Respondent files a Motion to Dismiss, Petitioner SHALL FILE an Opposition or Statement of Non-Opposition within **TWENTY-ONE (21) days** of the date Respondent's Motion is filed with the Court. Any Reply to an Opposition to the Motion to Dismiss SHALL be filed within **SEVEN (7) days** after the opposition is served. The Motion to Dismiss will be deemed submitted **TWENTY-EIGHT (28) days** after the service of the Motion or when the Reply is filed, whichever comes first. See Local Rule 230(1).
4. The Clerk of the Court is DIRECTED to SERVE a copy of this order on the Attorney General or his representative.

All motions shall be submitted on the record and briefs filed without oral argument unless otherwise ordered by the Court. Local Rule 230(1). Extensions of time will only be granted upon a showing of good cause. All provisions of Local Rule 110 are applicable to this order.

IT IS SO ORDERED.

Dated: February 21, 2012

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

(providing that Motions to Dismiss pursuant to Rule 4 are proper in a federal habeas proceeding.)