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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

<p>EUGENE HAYDEN, SR.,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>M.E. SEARMAN, Warden,</p> <p style="text-align: right;">Respondent.</p>	<p>1:14-cv-00514 LJO MJS HC</p> <p>ORDER GRANTING MOTION TO RESCIND FINDINGS AND RECOMMENDATION (Docs. 8, 11)</p> <p>ORDER REQUIRING RESPONDENT TO FILE RESPONSE</p> <p>ORDER SETTING BRIEFING SCHEDULE</p> <p>ORDER DIRECTING CLERK OF COURT TO SERVE DOCUMENTS ON ATTORNEY GENERAL</p>
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1:14-cv-00514 LJO MJS HC

ORDER GRANTING MOTION TO RESCIND FINDINGS AND RECOMMENDATION (Docs. 8, 11)

ORDER REQUIRING RESPONDENT TO FILE RESPONSE

ORDER SETTING BRIEFING SCHEDULE

ORDER DIRECTING CLERK OF COURT TO SERVE DOCUMENTS ON ATTORNEY GENERAL

Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

On June 2, 2014, the Court issued a findings and recommendation based on Petitioner's failure to file a signed declaration as required by the Court's April 25, 2014 order. Petitioner responded to the findings and recommendation, explained that he was never served with the order, and submitted a declaration as required. Court records do not reflect that the April 25, 2014 order was served on Petitioner. Accordingly, Petitioner's motion is granted and the findings and recommendation is hereby WITHDRAWN.

Furthermore, preliminary review of the petition fails to reveal whether Petitioner is

1 entitled to relief. 28 U.S.C. § 2243. Accordingly, pursuant to Rule 4 of the Rules
2 Governing Section 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,¹ the
3 Court HEREBY ORDERS:

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

9 A. AN ANSWER addressing the merits of the Petition. Respondent SHALL
10 INCLUDE with the Answer any and all transcripts or other documents
11 necessary for the resolution of the issues presented in the Petition. See
12 Rule 5, Rules Governing Section 2254 Cases. In the event Respondent
13 asserts in the ANSWER that Petitioner has *procedurally defaulted* a claim,
14 Respondent must also address the merits of the claim asserted. Copies of
15 all transcripts and documents shall be filed electronically, unless not
16 possible. See Local Rule 190(f).

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

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

26 ² Respondent is advised that a scanned copy of the Petition is available in the Court's electronic
27 case filing system ("CM/ECF").

28 ³ Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court's determination
that summary dismissal is inappropriate, the "judge must order the respondent to file an answer or *other*
pleading . . . or to take other action the judge may order." Rule 4, Rules Governing Section 2254 Cases
(emphasis added); 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) (providing that Motions to Dismiss pursuant to Rule 4 are proper in a
(continued...))

1 state court filings shall be filed electronically, unless not possible. See
2 Local Rule 190(f).

3 2. If Respondent files an Answer to the Petition, Petitioner MAY FILE a Traverse
4 within **THIRTY (30) days** of the date Respondent's Answer is filed with the Court.
5 If no Traverse is filed, the Petition and Answer are deemed submitted at the
6 expiration of the thirty days.

7 3. If Respondent files a Motion to Dismiss, Petitioner SHALL FILE an Opposition or
8 Statement of Non-Opposition within **TWENTY-ONE (21) days** of the date
9 Respondent's Motion is filed with the Court. If no Opposition is filed, the Motion to
10 Dismiss is deemed submitted at the expiration of the thirty days. Any Reply to an
11 Opposition to the Motion to Dismiss SHALL be filed within **SEVEN (7) days** after
12 the opposition is served.

13 4. Unless already submitted, both Respondent and Petitioner SHALL COMPLETE
14 and RETURN to the Court within **THIRTY (30) days** a Consent/Decline form
15 indicating whether the party consents or declines to consent to the jurisdiction of
16 the United States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

17 5. The Clerk of the Court is DIRECTED to SERVE a copy of this order on the
18 Attorney General or his representative.

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

23
24 IT IS SO ORDERED.

25 Dated: July 20, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

26
27 _____
28 (...continued)
federal habeas proceeding.)