

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN MICHAEL KELLY,
Petitioner,

v.

RAYMOND MADDEN,
Respondent.

No. 1:16-cv-01577-DAD-JLT (HC)
ORDER WITHDRAWING FINDINGS AND RECOMMENDATION OF MARCH 20, 2017 [Doc. 20]
ORDER GRANTING RESPONDENT'S MOTION TO WITHDRAW MOTION TO DISMISS [Doc. 25, 14]
ORDER DEEMING PETITIONER'S MOTION TO STAY AS MOOT [Doc. 17]

On March 20, 2017, the Court issued Findings and Recommendation to grant Respondent's motion to dismiss for failure to exhaust and to deny Petitioner's motion for stay of proceedings. (Doc. Nos. 14, 17, 20). On April 6, 2017, Petitioner filed objections to the Findings and Recommendations. (Doc. No. 21). After expiration of the time for filing a reply to objections, the Findings and Recommendation was submitted to the District Judge for review.

On May 3, 2017, Petitioner filed a motion to proceed with the petition. He stated that the California Supreme Court recently issued an order denying his unexhausted claims on April 19, 2017, and that his claims were now fully exhausted. On May 9, 2017, the Court directed Respondent to submit a supplement to his motion to dismiss or file a motion to withdraw the motion to dismiss in light of Petitioner's motion. On June 6, 2017, Respondent filed a motion to

1 withdraw the motion to dismiss conceding that Petitioner had exhausted his claims.

2 **ORDER**

3 Accordingly, the Court **ORDERS:**

4 1. The Findings and Recommendation of March 20, 2017 (Doc. 20), is

5 **WITHDRAWN;**

6 2. The request to withdraw the motion to dismiss (Doc. 25, 14) is **GRANTED;**

7 3. The request to stay the action (Doc. 17) is **MOOT;**

8 4. Respondent **SHALL:**

9 A. File a response to the Petition¹ **within 60 days** of the date of service of this
10 order. See Rule 4, Rules Governing Section 2254 Cases; Cluchette v.
11 Rushen, 770 F.2d 1469, 1473-1474 (9th Cir. 1985)(court has discretion to
12 fix time for filing a response). A Response can be made by filing one of
13 the following:

14 i. An answer addressing the merits of the Petition. Respondent
15 **SHALL** include with the Answer any and all transcripts or other
16 documents necessary for the resolution of the issues presented in
17 the petition. See Rule 5, Rules Governing Section 2254 Cases.
18 Any argument by Respondent that Petitioner has *procedurally*
19 *defaulted* a claim **SHALL** be made in the answer, but must also
20 address the merits of the claim asserted.

21 ii. A motion to dismiss the petition. A motion to dismiss **SHALL**
22 include copies of all Petitioner's state court filings and dispositive
23 rulings. See Rule 5, Rules Governing Section 2254 Cases.²

24 B. If Respondent files an **answer** to the petition, Petitioner may file a traverse

25 ³Rule 4 of the Rules Governing Section 2254 Cases provides that upon the Court's determination that summary
26 dismissal is inappropriate, the "judge must order the respondent to file an answer or *other pleading...or to take other*
27 *action the judge may order.*" Rule 4, Rules Governing 2254 Cases (emphasis added); see also Advisory Committee
28 Notes to Rules 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, 602-603 (9th Cir. 1989)(providing that Motions to Dismiss
pursuant to Rule 4 are proper in a federal habeas proceeding).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

within 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.

C. If Respondent files a motion to dismiss, Petitioner **SHALL** file an opposition or Statement of non-opposition **within 21 days** of the date Respondent’s motion is filed with the Court. If no opposition is filed, the motion to dismiss is deemed submitted at the expiration of the thirty days. Any reply to an opposition to the motion to dismiss **SHALL** be filed **within 7 days** after the opposition is served.

D. Unless already submitted, both Respondent and Petitioner **SHALL** complete and return to the Court **within 30 days** a consent/decline form indicating whether the party consents or declines to consent to the jurisdiction of the United States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

IT IS SO ORDERED.

Dated: June 8, 2017

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE