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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK D. KELLEY, JR.,

Petitioner,

v.

CORCORAN STATE PRISON,

Respondent.

Case No. 1:17-cv-00278- EPG-HC

ORDER DISMISSING WITHOUT
PREJUDICE PETITION FOR WRIT OF
HABEAS CORPUS, DIRECTING CLERK
OF COURT TO CLOSE CASE, AND
DECLINING TO ISSUE CERTIFICATE OF
APPEALABILITY

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 wherein he challenges the California Department of Corrections and Rehabilitation’s calculation of his sentence. As Petitioner’s claim is unexhausted, the Court finds that dismissal of the petition without prejudice is warranted.

I.

BACKGROUND

On February 27, 2017, Petitioner filed the instant federal petition for writ of habeas corpus. (ECF No. 1). On March 9, 2017, the Court ordered Petitioner to show cause why the petition should not be dismissed for failure to exhaust state judicial remedies. (ECF No. 4). On March 21, 2017, Petitioner filed his response. (ECF No. 6). Petitioner has consented to the jurisdiction of the United States Magistrate Judge. (ECF No. 5).

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1 **II.**

2 **DISCUSSION**

3 **A. Exhaustion**

4 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
5 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
6 to file a response, if it “plainly appears from the petition and any attached exhibits that the
7 petitioner is not entitled to relief in the district court.” A petitioner in state custody who is
8 proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28
9 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the
10 state court the initial opportunity to correct the state’s alleged constitutional deprivations.
11 Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A
12 petitioner can satisfy the exhaustion requirement by providing the highest state court with a full
13 and fair opportunity to consider each claim before presenting it to the federal court. O’Sullivan v.
14 Boerckel, 526 U.S. 838, 845 (1999); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v.
15 Connor, 404 U.S. 270, 276 (1971).

16 Here, the petition states that Petitioner’s claim has been appealed to the third level of
17 administrative review. (ECF No. 1 at 8).¹ The petition also indicates that Petitioner has not filed
18 any other petitions, applications, or motions with respect to this issue. (Id. at 9). In his response
19 to the order to show cause, Petitioner states, “I received this notices. However, I’m confused due
20 to its making as I filed this HC petition in California Supreme Court which is false. . . . I’m
21 clarifying that on 2-2-17 this matter is brought only to your court.” (ECF No. 6). If Petitioner has
22 not sought relief in the California Supreme Court for the claim that he raises in the instant
23 petition, this Court cannot proceed to the merits of that claim. 28 U.S.C. § 2254(b)(1). The Court
24 must dismiss without prejudice a petition containing unexhausted claims to give a petitioner an
25 opportunity to exhaust the claims if he can do so. See Lundy, 455 U.S. at 522.

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28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 **B. Certificate of Appealability**

2 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
3 district court’s denial of his petition, and an appeal is only allowed in certain circumstances.
4 Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining
5 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

6 (a) In a habeas corpus proceeding or a proceeding under section
7 2255 before a district judge, the final order shall be subject to
8 review, on appeal, by the court of appeals for the circuit in which
9 the proceeding is held.

10 (b) There shall be no right of appeal from a final order in a
11 proceeding to test the validity of a warrant to remove to another
12 district or place for commitment or trial a person charged with a
13 criminal offense against the United States, or to test the validity of
14 such person’s detention pending removal proceedings.

15 (c) (1) Unless a circuit justice or judge issues a certificate of
16 appealability, an appeal may not be taken to the court of
17 appeals from—

18 (A) the final order in a habeas corpus proceeding in which
19 the detention complained of arises out of process issued by
20 a State court; or

21 (B) the final order in a proceeding under section 2255.

22 (2) A certificate of appealability may issue under paragraph (1)
23 only if the applicant has made a substantial showing of the
24 denial of a constitutional right.

25 (3) The certificate of appealability under paragraph (1) shall
26 indicate which specific issue or issues satisfy the showing
27 required by paragraph (2).

28 If a court denies habeas relief on procedural grounds without reaching the underlying
constitutional claims, the court should issue a certificate of appealability “if jurists of reason
would find it debatable whether the petition states a valid claim of the denial of a constitutional
right and that jurists of reason would find it debatable whether the district court was correct in its
procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “Where a plain procedural bar
is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist
could not conclude either that the district court erred in dismissing the petition or that the
petitioner should be allowed to proceed further.” Id.

1 In the present case, the Court finds that reasonable jurists would not find the Court's
2 determination that Petitioner's federal habeas corpus petition should be dismissed debatable or
3 wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court declines to
4 issue a certificate of appealability.

5 **III.**

6 **ORDER**

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The petition for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE;
9 2. The Clerk of Court is DIRECTED to CLOSE the case; and
10 3. The Court DECLINES to issue a certificate of appealability.

11 IT IS SO ORDERED.

12 Dated: March 31, 2017

13 /s/ Eric P. Gray
14 UNITED STATES MAGISTRATE JUDGE