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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE LUIS KELLY CUEVAS,
Petitioner,
v.
J. SULLIVAN,
Respondent.

Case No. 1:18-cv-01281-LJO-JDP
FINDINGS AND RECOMMENDATIONS
THAT COURT DENY RESPONDENT’S
MOTION TO DISMISS AND
PETITIONER’S MOTION TO STAY
WITHOUT PREJUDICE
ECF Nos. 19, 26
ORDER DENYING PETITIONER’S
MOTION FOR COUNSEL WITHOUT
PREJUDICE
ECF No. 23

Petitioner Jose Luis Kelly Cuevas, a state prisoner without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 8. Respondent moves to dismiss the petition as untimely. ECF No. 19. Petitioner alleges that his appellate counsel’s refusal to pursue review by the California Supreme Court precluded him from filing a timely petition. Rather than holding an evidentiary hearing to assess the veracity of petitioner’s allegations, we recommend that the court deny respondent’s motion to dismiss without prejudice and direct briefing on the merits.

Respondent also moves to dismiss the petition as unexhausted. ECF No. 19 at 4-8. In response, petitioner moves to stay the proceeding so that he can exhaust his allegedly unexhausted claims in state court. ECF No. 26. Petitioner alleges that he filed a pro se petition for review by the California Supreme Court in February 2017, but respondent has not filed a copy

1 of the February 2017 petition. Given the limited record, we cannot tell whether petitioner has
2 exhausted his claims, so the court should deny without prejudice respondent's motion to dismiss
3 for failure to exhaust and petitioner's motion to stay.

4 **I. Timeliness**

5 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-
6 year time limit for filing a federal petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1).
7 The parties agree that, unless tolling applies, petitioner's one-year period had run when the instant
8 petition was filed. The only question is whether the one-year period should be tolled.

9 Petitioner has alleged, in his federal and state habeas petitions, that his ineffective
10 assistance of counsel precluded him from seeking review by the California Supreme Court. *See*
11 ECF No. 8 at 2; ECF No. 21-3 at 3. According to petitioner, he has difficulties with the English
12 language, but his appellate counsel told him that he must file his petition for review pro se. *See*
13 ECF No. 21-3 at 3. Both the federal and state petitions are signed under penalty of perjury.
14 ECF No. 8 at 6; ECF No. 21-3 at 19. These allegations may call for an evidentiary hearing. *See*
15 *Laws v. Lamarque*, 351 F.3d 919, 921, 924 (9th Cir. 2003) (remanding and noting that petitioner
16 need not "carry a burden of persuasion . . . in order to merit further investigation into the merits of
17 his argument for tolling" at pleading stage (citing *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148
18 (9th Cir. 2000))). On the other hand, respondent has not admitted or denied petitioner's
19 allegations, and without further submissions from the parties, it is premature to decide whether
20 the one-year statute of limitations period should be tolled.

21 For efficiency's sake, we recommend that the court deny respondent's motion to dismiss
22 without prejudice and consider the petition's merits. A district court may deny a motion to
23 dismiss without prejudice and direct the parties to brief the merits. *See Franklin v. Johnson*, 290
24 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than
25 the merits issues . . . so it may well make sense in some instances to proceed to the merits if the
26 result will be the same."); *McCoy v. Soto*, No. 15-cv-1578, 2017 WL 2644837, at *3 (E.D. Cal.
27 June 20, 2017) (denying motion to dismiss on statute of limitations and noting, "In the instant
28 case, it appears that judicial economy will be better served by adjudicating Petitioner's claims on

1 the merits.”). The parties are free to develop the record further and address the timeliness issue
2 when they brief the merits. If the court adopts these findings and recommendations, a new
3 briefing schedule will issue.

4 **II. Exhaustion**

5 Respondent moves to dismiss the petition as unexhausted. ECF No. 19 at 4-8.
6 Respondent contends that petitioner has failed to raise all habeas claims before the California
7 Supreme Court. *See id.* at 5-8. In response, petitioner moves to stay the proceeding so that he
8 can exhaust his allegedly-unexhausted claims in state court. ECF No. 26.

9 A factual dispute precludes dismissing the petition for failure to exhaust. According to
10 petitioner, he filed a petition with the California Supreme Court on February 17, 2017.
11 ECF No. 8 at 2. According respondent, a petition with the California Supreme Court was filed
12 about four months later, on June 21, 2017. ECF No. 21-4 at 1. Respondent has not filed a copy
13 of the February 17, 2017 petition or any evidence that could establish that petitioner filed only
14 one state petition and that the sole state petition was the June 21, 2017 petition. Without such
15 evidence, we cannot tell whether petitioner has exhausted his claims in his February 17, 2017
16 petition.¹ Because we cannot decide the exhaustion issue, we cannot decide respondent’s motion
17 to dismiss or petitioner’s motion to stay. The court should deny without prejudice respondent’s
18 motion to dismiss for failure to exhaust and petitioner’s motion to stay. Again, the parties may
19 argue exhaustion issue later in the case, but they must raise such arguments in addition to those
20 on the merits.

21 **III. Petitioner’s Motion for Appointment of Counsel**

22 Petitioner moves for appointment of counsel, stating that he does not speak fluent English.
23 ECF No. 23. We are not yet persuaded that this case warrants appointment of counsel. Petitioner
24 may renew his motion for counsel once the parties fully brief the merits, but his motion for

25 ¹ Respondent states that petitioner has filed only “one filing with the California Supreme Court,”
26 citing a copy of petitioner’s June 21, 2017 petition. ECF No. 19, at 5 (citing ECF No. 21-3). The
27 copy of the June 21, 2017 petition, however, does not show that petitioner filed only one petition
28 and does not address his allegation that he filed such a petition on a different date, February 17,
2017. In addition, respondent has not properly authenticated the exhibits submitted in support of
the motion to dismiss.

1 counsel is denied at this time without prejudice.

2 **IV. Order**

3 Petitioner's motion for appointment of counsel, ECF No. 23, is denied without prejudice

4 **V. Findings and Recommendations**

5 We recommend that the court deny without prejudice respondent's motion to dismiss,
6 ECF No. 19, and petitioner's motion to stay, ECF No. 26.

7 These findings and recommendations are submitted to the U.S. District Court Judge
8 presiding over this case under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of
9 Practice for the United States District Court, Eastern District of California. Within 14 days of the
10 service of the findings and recommendations, any party may file written objections to the findings
11 and recommendations with the court and serve a copy on all parties. That document must be
12 captioned "Objections to Magistrate Judge's Findings and Recommendations." The District
13 Judge will then review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C).

14
15 IT IS SO ORDERED.

16 Dated: August 16, 2019


UNITED STATES MAGISTRATE JUDGE

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20 No. 202.

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