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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GERALD BRENT HARRIS,
Petitioner,
v.
SCOTT FRAUENHEIM,
Respondent.

Case No. 1:19-cv-01203-LJO-SAB-HC
ORDER TO SHOW CAUSE

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.”

A petitioner in state custody who is proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state’s alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before

1 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
2 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

3 If Petitioner has not sought relief in the California Supreme Court, the Court cannot
4 proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). The Court must dismiss without
5 prejudice a “mixed” petition containing both exhausted and unexhausted claims to give a
6 petitioner an opportunity to exhaust the claims if he can do so. See Lundy, 455 U.S. at 522.
7 However, a petitioner may, at his option, withdraw the unexhausted claims and go forward with
8 the exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict
9 courts must provide habeas litigants with the opportunity to amend their mixed petitions by
10 striking unexhausted claims as an alternative to suffering dismissal.”). A petitioner may also
11 move to withdraw the entire petition and return to federal court when he has finally exhausted his
12 state court remedies.¹

13 Additionally, a petitioner may also move to stay and hold in abeyance the petition while
14 he exhausts his claims in state court. See Rhines v. Weber, 544 U.S. 269, 277 (2005); Kelly v.
15 Small, 315 F.3d 1063, 1070–71 (9th Cir. 2002). Under Rhines, “stay and abeyance” is available
16 only in limited circumstances, and only when: (1) there is “good cause” for the failure to
17 exhaust; (2) the unexhausted claims are not “plainly meritless”; and (3) the petitioner did not
18 intentionally engage in dilatory litigation tactics. 544 U.S. at 277–78.

19 Under Kelly, a three-step procedure is used: (1) the petitioner amends his petition to
20 delete any unexhausted claims; (2) the court in its discretion stays the amended, fully exhausted
21 petition, and holds it in abeyance while the petitioner has the opportunity to proceed to state
22 court to exhaust the deleted claims; and (3) once the claims have been exhausted in state court,
23 the petitioner may return to federal court and amend his federal petition to include the newly-
24 exhausted claims. 315 F.3d at 1070–71 (citing Calderon v. United States Dist. Court (Taylor),
25 134 F.3d 981, 986 (9th Cir. 1998)). A petitioner’s use of Kelly’s three-step procedure, however,
26 is subject to the requirement of Mayle v. Felix, 545 U.S. 644, 664 (2005), that any newly

27 ¹ Although the limitations period tolls while a properly filed request for collateral review is pending in state court,
28 28 U.S.C. § 2244(d)(2), it does not toll for the time a federal habeas petition is pending in federal court. Duncan v.
Walker, 533 U.S. 167, 181–82 (2001).

1 exhausted claims that a petitioner seeks to add to a pending federal habeas petition must be
2 timely or relate back, i.e., share a “common core of operative facts,” to claims contained in the
3 original petition that were exhausted at the time of filing. King v. Ryan, 564 F.3d 1133, 1143
4 (9th Cir. 2009).

5 In the instant petition, Petitioner acknowledges that the claim that he raises in Ground
6 Five of the petition currently is pending in a collateral challenge in the California Court of
7 Appeal. (ECF No. 1 at 5).²

8 **II.**

9 **ORDER**

10 Accordingly, IT IS HEREBY ORDERED that Petitioner is ORDERED to SHOW
11 CAUSE within **THIRTY (30) days** from the date of service of this order why the petition should
12 not be dismissed for failure to exhaust state remedies.

13 Petitioner is forewarned that failure to follow this order may result in a recommendation
14 for dismissal of the petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner’s
15 failure to prosecute or to comply with a court order may result in a dismissal of the action).

16 IT IS SO ORDERED.

17 Dated: October 3, 2019

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UNITED STATES MAGISTRATE JUDGE

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28 ² Page numbers refer to the ECF page numbers stamped at the top of the page.