

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BARCIMEO MERINO CANDELARIA,

| Case No. 1:24-cv-01358-SAB-HC

Petitioner,

FINDINGS AND RECOMMENDATION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

TRISTAN LEMON,

**ORDER DIRECTING CLERK OF COURT
TO RANDOMLY ASSIGN DISTRICT
JUDGE**

Respondent.

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

I.

BACKGROUND

On November 6, 2024, Petitioner filed the instant petition for writ of habeas corpus wherein Petitioner challenges a Kern County conviction. (ECF No. 1.) On December 23, 2024, the Court ordered Petitioner to show cause why the petition should not be dismissed for failure to exhaust state judicial remedies. (ECF No. 5.) To date, no response to the order to show cause has been filed, and the time for doing so has passed.

II.

DISCUSSION

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

1 petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254
2 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

3 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
4 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
5 on comity to the state court and gives the state court the initial opportunity to correct the state’s
6 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
7 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
8 providing the highest state court with a full and fair opportunity to consider each claim before
9 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
10 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

11 Here, Petitioner acknowledges that Grounds Three through Ten were discovered after the
12 California Supreme Court’s denial of his petition for review and asks the Court “to remand the
13 new issues raised.” (ECF No. 1 at 8.¹) If Petitioner has not sought relief in the California
14 Supreme Court, the Court cannot proceed to the merits of his claims. 28 U.S.C. § 2254(b)(1).
15 “Federal courts may not adjudicate mixed habeas petitions, that is, those containing both
16 exhausted and unexhausted claims.” Henderson v. Johnson, 710 F.3d 872, 873 (9th Cir. 2013).
17 The Court must dismiss without prejudice a mixed petition containing both exhausted and
18 unexhausted claims to give a petitioner an opportunity to exhaust the claims if he can do so.
19 Lundy, 455 U.S. at 522. However, a petitioner may, at his option, withdraw the unexhausted
20 claims and go forward with the exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574
21 (9th Cir. 2000) (“[D]istrict courts must provide habeas litigants with the opportunity to amend
22 their mixed petitions by striking unexhausted claims as an alternative to suffering dismissal.”).²
23 Petitioner may move to withdraw the entire petition and return to federal court when he has
24 finally exhausted his state court remedies.³

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

26 ² The Court notes that “prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so
27 risks subjecting later petitions that raise new claims to rigorous procedural obstacles,” such as the bar against second
or successive petitions. Burton v. Stewart, 549 U.S. 147, 154 (2007).

28 ³ Although the limitation period tolls while a properly filed request for collateral review is pending in state court, 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 Additionally, Petitioner may move to stay and hold in abeyance the petition while he
2 exhausts his claims in state court. Under Rhines v. Weber, 544 U.S. 269 (2005), “stay and
3 abeyance” is available only in limited circumstances, and only when: (1) there is “good cause”
4 for the failure to exhaust; (2) the unexhausted claims are not “plainly meritless”; and (3) the
5 petitioner did not intentionally engage in dilatory litigation tactics. 544 U.S. at 277–78. Under
6 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002), a three-step procedure is used: (1) the petitioner
7 amends his petition to delete any unexhausted claims; (2) the court in its discretion stays the
8 amended, fully exhausted petition, and holds it in abeyance while the petitioner has the
9 opportunity to proceed to state court to exhaust the deleted claims; and (3) once the claims have
10 been exhausted in state court, the petitioner may return to federal court and amend his federal
11 petition to include the newly exhausted claims. Kelly, 315 F.3d at 1070–71 (citing Calderon v.
12 United States Dist. Court (Taylor), 134 F.3d 981, 986 (9th Cir. 1998)).

13 Petitioner has failed to respond to the order to show cause. As it appears Petitioner has
14 not sought relief in the California Supreme Court for all of his claims, the Court cannot proceed
15 to the merits of his claims. 28 U.S.C. § 2254(b)(1). Accordingly, the Court finds that the petition
16 contains both exhausted and unexhausted claims and should be dismissed without prejudice.

III.

RECOMMENDATION & ORDER

19 Based on the foregoing, the Court HEREBY RECOMMENDS that the petition for writ of
20 habeas corpus be DISMISSED without prejudice for failure to exhaust state judicial remedies.

21 Further, the Clerk of Court is DIRECTED to randomly assign this action to a District
22 Judge.

23 This Findings and Recommendation is submitted to the assigned United States District
24 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
25 Rules of Practice for the United States District Court, Eastern District of California. Within
26 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file
27 written objections with the Court, **limited to fifteen (15) pages in length, including any**
28 **exhibits**. Such a document should be captioned “Objections to Magistrate Judge’s Findings and

1 Recommendation.” The assigned United States District Court Judge will then review the
2 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that
3 failure to file objections within the specified time may waive the right to appeal the District
4 Court’s order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
5 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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7 IT IS SO ORDERED.

8 Dated: March 6, 2025


9 STANLEY A. BOONE
10 United States Magistrate Judge

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