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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERY MARK COLE,

Petitioner,

No. CIV S-09-2549 LKK DAD P

vs.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondents.

ORDER

_____ /

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

On January 26, 2010, respondent filed a motion to dismiss the petition on the ground that petitioner failed to properly exhaust his sole federal habeas claim by first fairly presenting it to the highest state court. Petitioner had not filed an opposition to the motion, so on March 10, 2010, the court issued an order to show cause and ordered petitioner to file and serve an opposition to respondent’s motion within twenty-one days. Petitioner has since filed a letter with the court explaining that he wishes to proceed with this action but was not aware that he could not raise “new grounds” in his petition. Petitioner notes that he would like an extension of time to file a petition containing grounds for relief he has exhausted on direct appeal in state

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1 court. Good cause appearing, the court will discharge its order to show cause and allow this
2 action to proceed in accordance with this order.

3 Petitioner is advised that the exhaustion of state court remedies is a prerequisite to
4 the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). Petitioner may
5 satisfy the exhaustion requirement by providing the highest state court with a full and fair
6 opportunity to consider all of his claims before presenting them to this federal court. Picard v.
7 Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

8 If petitioner has not presented his sole federal habeas claim to the California
9 Supreme Court as respondent contends, he has not satisfied the exhaustion requirement with
10 respect to this claim. If this is the case, petitioner may not proceed in this action on his current
11 petition. Petitioner indicates in his letter to the court, however, that he is interested in amending
12 his petition to include claims that he has previously exhausted on direct appeal. If he wishes to
13 proceed in this fashion, he may file a request to amend his petition, together with a proposed
14 amended petition.

15 If, on the other hand, petitioner believes that he has fairly presented his sole
16 federal habeas claim to the California Supreme Court on direct appeal, he may be able to proceed
17 in this action on his current petition. If this is the case, he should file an opposition to
18 respondent's motion explaining when he presented his pending federal claim to the California
19 Supreme Court.

20 Under these circumstances, the court will grant petitioner thirty days to either (1)
21 file a request to amend his petition, together with a proposed amended petition, or (2) file an
22 opposition to respondent's motion to dismiss explaining when he presented his sole federal
23 habeas claim to the California Supreme Court.

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1 In accordance with the above, IT IS HEREBY ORDERED that:

- 2 1. The court’s March 10, 2010 order to show cause is discharged;
- 3 2. Within thirty days of the date of service of this order, petitioner shall either:
 - 4 (a) file a request to amend his petition, together with a proposed amended
 - 5 petition; or
 - 6 (b) file an opposition to respondent’s motion to dismiss explaining when
 - 7 he presented his sole federal habeas claim to the California Supreme
 - 8 Court; and
- 9 3. The Clerk of the Court is directed to send petitioner the court’s form for filing

10 a petition for writ of habeas corpus.

11 DATED: April 1, 2010.



 DALE A. DROZD
 UNITED STATES MAGISTRATE JUDGE

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