

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

JEFFREY A. PATE,

Petitioner,

No. 2: 10-cv-1448 KJM KJN P

VS.

WARDEN MARTELL,

Respondent.

ORDER

Petitioner is state prisoner, proceeding without counsel, with a habeas corpus petition pursuant to 28 U.S.C. § 2254. This action is proceeding on the original petition filed June 11, 2010, which raises one claim: ineffective assistance of appellate counsel. In the answer filed March 24, 2011, respondent argues that this claim is not exhausted but should nevertheless be denied on the merits. See 28 U.S.C. § 2254(a)(2) (a habeas petition may be denied on the merits, notwithstanding the failure of the applicant to exhaust state court remedies.)

In the reply to the answer filed June 14, 2011, petitioner requested that this action be stayed so that he could return to state court and exhaust his unexhausted claims. On July 14, 2011, the undersigned issued an order informing petitioner that the court did not have the authority to stay a petition containing only unexhausted claims. See Rhines v. Weber, 544 U.S. 268, 277 (2005). In this order, the undersigned found that after reviewing the record, petitioner's

1 ineffective assistance of appellate counsel claim was not exhausted. The undersigned also noted
2 that petitioner had other exhausted claims.

3 Because the petition contained only an unexhausted claim, the undersigned
4 advised petitioner that he had two options. Petitioner could either proceed with the instant action
5 and his unexhausted claim, or he could voluntarily dismiss this action.¹ The July 14, 2011 order
6 advised petitioner that if he dismissed this action and returned to state court, he should be
7 mindful of the statute of limitations which may bar any future habeas petition filed in federal
8 court. See 28 U.S.C. § 2244(d)(1) (one year statute of limitations applies to habeas corpus
9 petitions filed pursuant to 28 U.S.C. § 2254.)

10 On August 5, 2011, petitioner filed a pleading stating that he wished to voluntarily
11 dismiss this action so that he may return to state court and exhaust other claims. Accordingly, IT
12 IS HEREBY ORDERED that this action is dismissed without prejudice. Fed. R. Civ. P. 41(a);
13 see also Rule 11, Rules Governing Habeas Corpus Cases Under Section 2254.

14 DATED: August 11, 2011

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17 KENDALL J. NEWMAN
18 UNITED STATES MAGISTRATE JUDGE

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24 ¹ Because petitioner had other exhausted claims, he could have filed an amended petition
25 containing his exhausted claims and requested a stay of this action pending exhaustion of additional
26 claims. Because petitioner did not include these exhausted claims in the original petition or seek to
file an amended petition containing these exhausted claims, the undersigned presumes that petitioner
did not intend to pursue these exhausted claims in a federal habeas corpus petition.