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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCOS AVALOS,
Petitioner,
v.
GREGG LEWIS,
Respondent.

No. 2:12-cv-0052 LKK DAD (HC)

ORDER

Petitioner is a state prisoner proceeding pro se and in forma pauperis with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 19, 2012, respondent filed a motion to dismiss, contending that the petition before the court was a mixed petition containing both exhausted and unexhausted claims. On June 4, 2012, petitioner filed a document styled as an opposition to the motion to dismiss, requesting therein that this action be stayed and held in abeyance pending exhaustion of petitioner’s unexhausted claims, or, in the alternative, that petitioner be granted leave to amend the petition to proceed with the exhausted claims. Findings and recommendations were issued on August 2, 2012, recommending that this action be stayed pending exhaustion of state court remedies as to petitioner’s unexhausted claims. On September 14, 2012, the assigned District Judge issued an order adopting those findings and recommendations in full, granting petitioner’s motion for a stay and abeyance of this action. In that order the court directed plaintiff to file a habeas petition presenting his unexhausted claims to the highest state court within thirty days of the order and to file a motion to lift the stay within

1 thirty days of any final decision by the California Supreme Court on the petition containing his
2 unexhausted claims.

3 On October 19, 2012, petitioner filed a motion seeking a thirty-day extension of time to
4 file his exhaustion petition in state court. On October 26, 2012, this court issued an order
5 granting his motion for an extension of time and giving petitioner thirty days from that date to
6 comply with the court's previous order.

7 Now before the court are petitioner's motions to lift the current stay on these proceedings
8 and to proceed on a first amended habeas petition. (ECF Nos. 28 and 32.) Also before the court
9 are petitioner's July 5, 2013 motion for a thirty-day extension of time to file his first amended
10 petition for writ of habeas corpus (ECF No. 29) and a November 7, 2013 motion to amend his
11 petition for writ of habeas corpus (ECF No. 30). Respondent has filed nothing in response to any
12 of petitioner's motions.

13 In his motion to lift the current stay, petitioner alleges that he filed a writ of habeas corpus
14 with the California Supreme Court on November 1, 2012¹ in order to exhaust his unexhausted
15 claims in state court, but that the petition was returned to him due to a deficiency. (ECF No. 28 at
16 1.) Petitioner represents that he corrected the deficiency noted by the court and re-filed his
17 exhaustion petition with the California Supreme Court on April 22, 2013. (Id.) According to
18 petitioner, on June 12, 2013² the California Supreme Court denied his re-filed exhaustion petition
19 with citing the decisions in In re Robbins, 18 Cal.4th 770, 780 (1998) and In re Clark, 5 Cal.4th
20 750, 767-69 (1993). (Id. at 1, 3.)

21 Good cause appearing, the court will grant petitioner's motion to lift the stay in this
22 action. The court will also direct the Clerk of the Court to re-open this case. Since petitioner may
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24 ¹ In his motion, petitioner states that he filed his petition with the California Supreme Court on
25 November 1, 2013 - a date later than the filing of petitioner's motion to lift stay. The court
26 presumes that this is merely a drafting error and that the actual filing date in the California was
November 1, 2012.

27 ² In his motion, petitioner states that his petition was denied by the California Supreme Court on
28 July 12, 2013. However, the order denying the petition was attached as an exhibit to petitioner's
motion and is dated June 12, 2013, not July 12, 2013.

1 be entitled to habeas corpus relief if the claimed violations of constitutional rights are proved,
2 respondent will be directed to file a response to the amended petition.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Petitioner's Motions to Lift Stay and Proceed on First Amended Writ of Habeas
5 Corpus filed July 5, 2013 and December 13, 2013 (ECF Nos. 28 and 31) are granted.

6 2. The Clerk of the Court is directed to re-open this case;

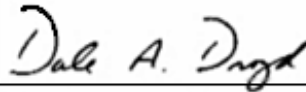
7 3. Petitioner's Motion for a Thirty-Day Extension of Time to File his First Amended
8 Petition (ECF No. 29) and his Motion to Amend (ECF No. 30) filed on November 7, 2013 are
9 granted and petitioner shall file his first amended federal habeas petition containing all of his
10 exhausted claims within thirty days of the date of this order;

11 4. Respondent is directed to file a response to petitioner's first amended petition within
12 thirty days after the filing and service of that amended petition. See Rules 4 and 5, Fed. R.
13 Governing § 2254 Cases. An answer shall be accompanied by all transcripts and other documents
14 relevant to the issues presented in the petition. See Rule 5, Fed. R. Governing § 2254 Cases;

15 5. If the response to the habeas petition is an answer, petitioner's reply, if any, shall be
16 filed and served within thirty days after service of the answer; and

17 6. If the response to the habeas petition is a motion, petitioner's opposition or statement
18 of non-opposition to the motion shall be filed and served within thirty days after service of the
19 motion, and respondent's reply, if any, shall be filed and served within fifteen days thereafter.

20 Dated: January 15, 2014

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22 _____
23 DALE A. DROZD
24 UNITED STATES MAGISTRATE JUDGE

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