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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LAMONT LEE RHINEHART,
Petitioner,
v.
STU SHERMAN, Warden,
Respondent.

No. 2:13-cv-2645 DAD P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis. Petitioner has also filed a motion for a stay and abeyance.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

PRELIMINARY SCREENING

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. . . .” Rule 4, Rules Governing Section 2254 Cases. As reflected in the Advisory Committee Notes to Rule 8 of the Rules Governing Section 2254 Cases, the court may dismiss a petition for writ of habeas corpus at several stages of a case,

1 including “summary dismissal under Rule 4; a dismissal pursuant to a motion by the respondent;
2 a dismissal after the answer and petition are considered; or a dismissal after consideration of the
3 pleadings and an expanded record.”

4 **BACKGROUND**

5 On December 23, 2013, petitioner commenced this action by filing a form petition for writ
6 of habeas corpus pursuant to 28 U.S.C. § 2254. Therein, petitioner raises a single claim
7 concerning an allegedly deficient petition for writ of habeas corpus filed on his behalf in state
8 court. Petitioner acknowledges that he did not raise this issue on direct appeal or through a post-
9 conviction motion or petition for writ of habeas corpus filed with the California Supreme Court.
10 (Pet. at 6-7.)

11 **DISCUSSION**

12 The exhaustion of state court remedies is a prerequisite to the granting of a federal petition
13 for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be
14 waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3). A waiver of exhaustion,
15 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
16 providing the highest state court with a full and fair opportunity to consider all claims before
17 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
18 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

19 Here, petitioner concedes that he has not presented the sole claim set forth in his federal
20 habeas petition for relief to the California Supreme Court. In addition, although petitioner has
21 filed a motion for a stay and abeyance, he is advised that a stay and abeyance is not available
22 where, as here, the federal habeas petition is wholly unexhausted. See Raspberry v. Garcia, 448
23 F.3d 1150, 1154 (9th Cir. 2006) (“Once a district court determines that a habeas petition contains
24 only unexhausted claims, it need not inquire further as to petitioner’s intentions. Instead, it may
25 simply dismiss the habeas petition for failure to exhaust.”). Accordingly, the court will dismiss

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1 the pending petition without prejudice because the single claim contained therein has not been
2 exhausted.¹

3 **OTHER MATTERS**

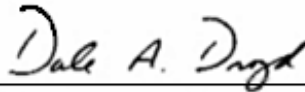
4 Rule 11 of the Federal Rules Governing Section 2254 Cases states that “the district court
5 must issue or deny a certificate of appealability when it enters a final order adverse to the
6 applicant.” A certificate of appealability should be granted for any issue that petitioner can
7 demonstrate is “debatable among jurists of reason,” could be resolved differently by a different
8 court, or is “adequate to deserve encouragement to proceed further.” Jennings v. Woodford,
9 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). For
10 the reasons set forth above, the undersigned declines to issue a certificate of appealability in this
11 case.

12 **CONCLUSION**

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. Petitioner’s motion to proceed in forma pauperis (Doc. No. 2) is granted;
15 2. Petitioner’s application for a writ of habeas corpus (Doc. No. 1) is dismissed without
16 prejudice;
17 3. Petitioner’s motion for a stay and abeyance (Doc. No. 3) is denied;
18 4. A certificate of appealability is not issued in this action; and
19 5. This action is closed.

20 Dated: February 4, 2014

21 

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

25 DAD:9
26 rhin2645.103

27 _____
28 ¹ Petitioner has consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C.
§ 636. (Doc. No. 5)