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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER LEONG,
Petitioner,
v.
D. ASUNCION,
Respondent.

No. 2:16-cv-1213 MCE GGH P

ORDER

On August 31, 2016, respondent filed a motion to dismiss based on failure to exhaust one of four claims. Petitioner shall file an opposition by September 30, 2016, and shall state in his opposition whether he intends to move for a stay and abeyance if indeed one of his claims is unexhausted.

The United States Supreme Court has held that a federal district court may not entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982). The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1).

A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.),

1 cert. denied, 478 U.S. 1021 (1986). A state court has had an opportunity to rule on the merits of a
2 claim when the petitioner has fairly presented that claim to that court. The fair presentation
3 requirement is met where the petitioner has described the operative facts and legal theory on
4 which his claim is based. Picard, 404 U.S. at 277-78. Generally, it is “not enough that all the
5 facts necessary to support the federal claim were before the state courts . . . or that a somewhat
6 similar state-law claim was made.” Anderson v. Harless, 459 U.S. 4, 6 (1982). Instead,

7 [i]f state courts are to be given the opportunity to correct alleged
8 violations of prisoners’ federal rights, they must surely be alerted to
9 the fact that the prisoners are asserting claims under the United
10 States Constitution. If a habeas petitioner wishes to claim that an
evidentiary ruling at a state court trial denied him the due process of
law guaranteed by the Fourteenth Amendment, he must say so, not
only in federal court, but in state court.

11 Duncan v. Henry, 513 U.S. 364, 365 (1995).

12 If the petition is indeed a mixed petition, petitioner may proceed in one of two ways when
13 he files his opposition. He may eliminate the fourth claim as unexhausted and proceed on the
14 exhausted Claims One through Three only. Or, petitioner may file a motion to stay this action
15 pending exhaustion of the unexhausted fourth claim.¹

16 In Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (2005) the United States Supreme
17 Court found that a stay and abeyance of a mixed federal petition should be available only in the
18 limited circumstance that good cause is shown for a failure to have first exhausted the claims in
19 state court, that the claim or claims at issue potentially have merit and that there has been no
20 indication that petitioner has been intentionally dilatory in pursuing the litigation. Rhines, supra,
21 at 277-78, 125 S.Ct at 1535.

22 If petitioner wishes to stay this action, he shall file a motion addressing the Rhines factors.
23 In the alternative, petitioner may proceed with a stay request as outlined in King v. Ryan, 564
24 F.3d 1133 (9th Cir. 2009) citing Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). In King, the

25 ¹ Petitioner is cautioned that the habeas corpus statute imposes a one-year statute of limitations
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period
27 will start to run on the date on which the state court judgment became final by the conclusion of
28 direct review or the expiration of time for seeking direct review, although the statute of
limitations is tolled while a properly filed application for state post-conviction or other collateral
review is pending. 28 U.S.C. § 2244(d).

1 Ninth Circuit held that in addition to the stay procedure authorized in Rhines, district courts also
2 have discretion to permit petitioners to follow the three-step stay-and-abeyance procedure
3 approved in Calderon v. U.S. Dist. Ct. (Taylor), 134 F.3d 981, 986 (9th Cir. 1998) and Kelly v.
4 Small, 315 F.3d 1063 (9th Cir. 2003), *overruled on other grounds*, Robbins v. Carey, 481 F.3d
5 1143 (2007). Pursuant to the King procedure, (1) a petitioner amends his petition to delete any
6 unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted
7 petition, allowing the petitioner the opportunity to proceed to state court to exhaust the deleted
8 claims; and (3) the petitioner later amends his petition and re-attaches the newly-exhausted claims
9 to the original petition. Kelly, 315 F.3d at 1070-71. The King stay-and-abeyance procedure has
10 no requirement of a good cause showing or that the claims are potentially meritorious. However,
11 no statute of limitations protection is imparted by such a stay, nor are exhausted claims
12 adjudicated during the pendency of such a stay.

13 In the alternative, petitioner may file an amended petition in this court raising only
14 exhausted claims. If petitioner chooses the second method, however, the court cautions that he
15 will risk forfeiting consideration of the unexhausted claims in this or any other federal court. See
16 McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455 U.S. at 520-21; Rule 9(b), Rules
17 Governing Section 2254 Cases.

18 Accordingly, IT IS HEREBY ORDERED that: Petitioner shall file an opposition to
19 respondent's August 31, 2016 motion to dismiss by **September 30, 2016**. Petitioner is cautioned
20 that failure to respond to the instant order, or to file an opposition to the pending motion to
21 dismiss, may result in a recommendation that this action be dismissed.

22 DATED: September 6, 2016

23
24 /s/ Gregory G. Hollows
25 UNITED STATES MAGISTRATE JUDGE

26 GGH:076/Leon1213.opp.sta
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