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

LACY MITCHELL,

Petitioner,

vs.

TERESA SCHWARTZ, Warden,

Respondent.

No. C 07-5457 JSW (PR)

**ORDER DISMISSING PETITION
FOR A WRIT OF MANDAMUS
AND DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS*:
NO FEE IS DUE**

This is a petition for a writ of mandamus brought pro se by a state prisoner, filed on October 25, 2007, apparently seeking to suspend proceedings to allow Petitioner to go back to state court to request an evidentiary hearing. However, it appears that Petitioner inadvertently filed this petition as a new case, because the proceeding that Petitioner apparently seeks to suspend involves his habeas corpus petition, filed under Case No. C 06-3776 JSW (PR), and currently pending before this Court. In this mandamus petition, Petitioner asserts that he wishes to pursue an evidentiary hearing on his ineffective assistance of counsel claims in state court. This Court has examined the earlier filed case, and the petition there includes the referenced ineffective assistance claims. Therefore, it appears that Petitioner is seeking to stay the earlier proceedings, so that he may return to the state courts. Moreover, mandamus is not the proper vehicle to suspend proceedings, as federal district courts are without power to issue mandamus to direct state courts, state judicial officers, or other state officials in the performance of their duties. A petition for a writ of mandamus to compel a state court or official to take or

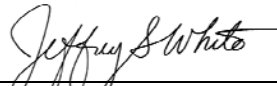
1 refrain from some action is frivolous as a matter of law. *See Demos v. U.S. District*
2 *Court*, 925 F.2d 1160, 1161-62 (9th Cir. 1991) (imposing no filing in forma pauperis
3 order). Therefore, this Court finds that this petition was filed in error as a new action and
4 must be dismissed.

5 If Petitioner, indeed, seeks to stay the pending habeas petition in order to exhaust
6 his claims in state court, there is a procedure by which he may wish to pursue the relief
7 he is seeking. A district court may stay a petition pending a petitioner's exhaustion of
8 additional claims, with the intention of allowing an amendment after exhaustion to add
9 the newly exhausted claims. *See Rhines v. Webber*, 125 S. Ct. 1528, 1535 (2005); *Kelly*
10 *v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003); *Calderon v. United States Dist. Court*
11 *(Taylor)*, 134 F.3d 981, 989 (9th Cir. 1998). However, under *Rhines*, a district court is
12 only authorized to hold a petition in abeyance in limited circumstances. In order to be
13 granted a stay and abeyance, a habeas petitioner must first establish: (1) good cause for
14 his failure to previously exhaust the claims; and (2) that the additional claims he seeks to
15 exhaust in state court are "potentially meritorious." *See Rhines*, 125 S. Ct. at 1535. If
16 Petitioner wishes to pursue a stay on his earlier-filed case, C 06-3776 JSW, he must file a
17 motion establishing that he is entitled to such a stay under the standard set forth in
18 *Rhines*. Petitioner must place the earlier case number, C 06-3776 JSW (PR), on any such
19 motion he wishes to file on that action and on all correspondence with the Court about it.

20 Accordingly, the instant petition is DISMISSED as inadvertently filed. The Clerk
21 shall close the file and enter judgment in this matter. Petitioner's motion seeking to
22 proceed *in forma pauperis* is DENIED (docket no. 2). Because the case was opened in
23 error, no fee is due.

24 IT IS SO ORDERED.

25 DATED: November 1, 2007

26 
27 _____
28 JEFFREY S. WHITE
United States District Judge

1
2 UNITED STATES DISTRICT COURT
3 FOR THE
4 NORTHERN DISTRICT OF CALIFORNIA
5

6 LACY MITCHELL,
7
8 Plaintiff,

Case Number: CV07-05457 JSW

CERTIFICATE OF SERVICE

9 v.


10 TERESA SCHWARTZ, et al,
11 Defendant.
_____ /

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on November 1, 2007, I SERVED a true and correct copy(ies) of the attached, by placing
15 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
16 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
17 delivery receptacle located in the Clerk's office.

18 Lacy Mitchell
19 California Medical Facility
20 P.O. Box 2000
V08358
Vacaville, CA 95696

21 Dated: November 1, 2007


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk

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