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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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8 No. C 15-5324 MEJ (PR)

9 In re CECILIO LARA ROMERO,

10 Petitioner,

**ORDER TO SHOW CAUSE WHY
PETITION SHOULD NOT BE
DISMISSED; GRANTING LEAVE TO
PROCEED IN FORMA PAUPERIS**

11
12 _____/ Dkt. No. 6

13 Petitioner, a prisoner currently incarcerated at the Taft Modified Community
14 Correctional Facility, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. §
15 2254, challenging a conviction from Contra Costa County Superior Court. He also seeks to
16 proceed in forma pauperis under 28 U.S.C. § 1915.

17 **BACKGROUND**

18 According to the petition, Petitioner was found guilty of unspecified crimes, and, on
19 or about August 31, 2012, Petitioner was sentenced to jail. Docket No. 5 (“Pet.”) at 2–3.
20 Petitioner does not specify the length of his sentence. Id. at 2. Petitioner appealed his
21 conviction and sentence, and the California Court of Appeal affirmed the conviction and
22 sentence in 2013. Id. at 3. On November 20, 2015, Petitioner filed a letter with this Court.
23 Docket No. 1. That same day, the Clerk of the Court informed Petitioner that he should
24 submit his petition for a writ of habeas corpus on the proper form. Docket No. 2. On
25 February 10, 2105, Petitioner filed the instant federal habeas petition. Docket No. 5.

26 **DISCUSSION**

27 This court may entertain a petition for writ of habeas corpus “in behalf of a person in
28 custody pursuant to the judgment of a state court only on the ground that he is in custody in
violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);

1 Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an
2 order directing the respondent to show cause why the writ should not be granted, unless it
3 appears from the application that the applicant or person detained is not entitled thereto.” 28
4 U.S.C. § 2243.

5 Prisoners in state custody who wish to challenge collaterally in federal habeas
6 proceedings either the fact or length of their confinement are first required to exhaust state
7 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
8 highest state court available with a fair opportunity to rule on the merits of each and every
9 claim they seek to raise in federal court. See 28 U.S.C. § 2254(b)-(c); see Rose v. Lundy,
10 455 U.S. 509, 522 (1982) (holding every claim raised in federal habeas petition must be
11 exhausted). The state’s highest court must be given an opportunity to rule on the claims even
12 if review is discretionary. See O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (petitioner
13 must invoke “one complete round of the State’s established appellate review process.”); see
14 also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (exhaustion requires that prisoner fairly
15 present his claim in each appropriate state court, including a state supreme court with powers
16 of discretionary review). If available state remedies have not been exhausted as to all claims,
17 the district court must dismiss the petition. Duckworth v. Serrano, 454 U.S. 1, 3–5 (1981).

18 Petitioner lists numerous grounds for federal habeas relief. Pet. at 5–7. However,
19 according to the petition, Petitioner has not presented any of these claims to the California
20 Supreme Court. In other words, he has not invoked a complete round of California’s
21 established appellate review process. See Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir.
22 1999) (holding that California law requires presentation of claims to the California Supreme
23 Court through petition for discretionary review in order to exhaust state court remedies)
24 (relying on Cal. R. Ct. 28(b) (1999), which was renumbered Rule 8.500 and amended in
25 2007, but still provides that the California Supreme Court has the discretion to review
26 decisions issued by the California Court of Appeal). The instant petition is therefore subject
27 to dismissal for failure to exhaust state remedies. Rose, 455 U.S. at 522 (requiring that all
28 claims in a federal habeas petition be exhausted).

1 Petitioner may avoid dismissal if he can show that he is entitled to a stay of the action.
2 Prisoners who may run the risk of having the federal statute of limitations expire while they
3 are exhausting their state remedies may avoid this predicament “by filing a ‘protective’
4 petition in federal court and asking the federal court to stay and abey the federal habeas
5 proceedings until state remedies are exhausted.” Pace v. DiGuglielmo, 544 U.S. 408, 416
6 (2005) (citing Rhines v. Webber, 544 U.S. 269, 277–78 (2005)). A federal court may stay a
7 petition that raises only unexhausted claims. Mena v. Long, No. 14-55102, 2016 WL
8 62540516, *1 (9th Cir. Feb. 17, 2016). A stay and abeyance “is only appropriate when the
9 district court determines there was good cause for the petitioner’s failure to exhaust his
10 claims first in state court;” the claims are not meritless; and there were no intentionally
11 dilatory litigation tactics by the petitioner. Rhines, 544 U.S. at 277–78. Any stay must be
12 limited in time to avoid indefinite delay. Id. Reasonable time limits would be 30 days to get
13 to state court, as long as reasonably necessary in state court, and 30 days to get back to
14 federal court after the final rejection of the claims by the state court. See id. at 278. If
15 Petitioner moves for a stay, he must show that he satisfies the Rhines criteria. The Rhines
16 Court cautioned district courts against being too liberal in allowing a stay because a stay
17 works against several of the purposes of the AEDPA in that it “frustrates AEDPA’s objective
18 of encouraging finality by allowing a petitioner to delay the resolution of the federal
19 proceeding” and “undermines AEDPA’s goal of streamlining federal habeas proceedings by
20 decreasing a petitioner’s incentive to exhaust all his claims in state court prior to filing his
21 federal petition.” Id. at 277.

22 In addition, it appears that the instant petition may be untimely. The Antiterrorism
23 and Effective Death Penalty Act of 1996 (“AEDPA”), which became law on April 24, 1996,
24 imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed
25 by state prisoners. Petitions filed by prisoners challenging noncapital state convictions or
26 sentences must be filed within one year of the latest of the date on which: (A) the judgment
27 became final after the conclusion of direct review or the time passed for seeking direct
28 review; (B) an impediment to filing an application created by unconstitutional state action

1 was removed, if such action prevented petitioner from filing; (C) the constitutional right
2 asserted was recognized by the Supreme Court, if the right was newly recognized by the
3 Supreme Court and made retroactive to cases on collateral review; or (D) the factual
4 predicate of the claim could have been discovered through the exercise of due diligence. 28
5 U.S.C. § 2244(d)(1). Time during which a properly filed application for state
6 post-conviction or other collateral review is pending is excluded from the one-year time
7 limit. Id. § 2244(d)(2). The one-year period generally will run from “the date on which the
8 judgment became final by conclusion of direct review or the expiration of the time for
9 seeking such review.” 28 U.S.C. § 2244(d)(1)(A). In the instant action, Petitioner reports
10 that the California Court of Appeal affirmed his conviction and sentence in 2013. Pet. at 3.
11 Petitioner could seek review of the California Court of Appeal decision by serving and filing
12 a petition for review within ten days after the California Court of Appeal’s decision became
13 final, Cal. R. Ct. 8.500(e)(1), but did not do so. At the latest, Petitioner’s judgment became
14 final in early 2014. The instant action was commenced on November 20, 2015, and is
15 possibly untimely, unless Petitioner is entitled to either delayed commencement of the
16 limitations period pursuant to 28 U.S.C. § 2244(d)(1)(B)-(D),¹ or equitable tolling of the
17 limitations period, Holland v. Florida, 560 U.S. 631, 645 (2010) (“[A] ‘petitioner’ is ‘entitled
18 to equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and
19 (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”)
20 (quoting Pace, 544 U.S. at 418)).

21 CONCLUSION

22 For the foregoing reasons, the Court orders as follows:

- 23 1. Within thirty (30) days of the date of this order, Petitioner must show cause
24 why this federal habeas action should not be dismissed either for failing to exhaust his claims

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26 ¹ The exceptions to the statute of limitations set forth in Section 2244(d)(1)(B)-(D) require
27 claim-by-claim consideration and allow for delayed commencement of the limitations period
28 where the delay in presenting the claim was due to governmental interference, § 2244(d)(1)(B);
where the claim was based on a constitutional right newly recognized by the Supreme Court and
made retroactive, § 2244(d)(1)(C); or where the factual predicate of the claim could not have
been discovered earlier, § 2244(d)(1)(D).


1 before filing suit, or for being untimely. If Petitioner seeks to stay and abey this action, he
2 must, within thirty (30) days of the date of this order, file a motion for a stay in which he
3 explains why he failed to exhaust his claims in state court before presenting them to this
4 court, that his claims are not meritless, and that he is not intentionally delaying resolution of
5 his constitutional claims. If Petitioner fails to respond in accordance with this order, the
6 action will be dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute.

7 2. The application to proceed in forma pauperis (Dkt. No. 6) is GRANTED.

8 This order terminates Docket No. 6.

9 IT IS SO ORDERED.

10 DATED: April 12, 2016


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12 Maria-Elena James
13 United States Magistrate Judge
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