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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

MARK ANTHONY KENNEDY,
Plaintiff,
v.
J. GASTELLO,
Defendant.

Case No. [16-cv-01686-LB](#)

ORDER FOR REASSIGNMENT
[Re: ECF No. 6]

The petitioner filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and consented to proceed before a magistrate judge. On April 29, 2016, the court issued an order to show cause why the petition should not be granted. The respondent has not yet appeared in this action, and has not yet consented to proceed before a magistrate judge.

The petitioner has filed a request for stay and abeyance so that he may return to state court to exhaust an additional claim. A stay and abeyance “is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court,” the claims are not meritless, and there are no intentionally dilatory litigation tactics by the petitioner. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Here, the petitioner did not describe the unexhausted claim (other than to mention it was for ineffective assistance of counsel), or show good cause for failing to exhaust it before filing his petition. Resolution of the petitioner’s request

1 for a stay and abeyance would be dispositive as to the unexhausted claim, and therefore may not
2 be decided by a magistrate judge without consent of all parties. *See Mitchell v. Valenzuela*, 791
3 F.3d 1166, 1167 (9th Cir. 2015) (motion for stay and abeyance in a habeas action “is generally
4 (but not always) dispositive as to the unexhausted claims. When it is dispositive, a magistrate
5 judge is without authority to ‘hear and determine’ such a motion, but rather must submit a report
6 and recommendation to the district court”). Because the consent of the respondent has not been
7 obtained, and waiting for the respondent to consent or decline to consent before ruling on the
8 request for a stay may work to the detriment of the petitioner (e.g., by making a claim untimely),
9 the clerk shall cause this action to be reassigned to a district judge.

10 **IT IS SO ORDERED.**

11 Dated: May 16, 2016

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14 LAUREL BEELER
15 United States Magistrate Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARK ANTHONY KENNEDY,
Plaintiff,

v.

J. GASTELLO,
Defendant.

Case No. 3:16-cv-01686-LB

CERTIFICATE OF SERVICE

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

That on May 16, 2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Mark Anthony Kennedy
California Mens Colony East (East) Cell 5388
PO Box 8101
San Luis Obispo, CA 93409-8101

Dated: May 16, 2016

Susan Y. Soong
Clerk, United States District Court

By: 
Lashanda Scott, Deputy Clerk to the
Honorable LAUREL BEELER