

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E-FILED - 11/20/08

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

L.C. HARMON,)	No. C 07-1576 RMW (PR)
)	
Petitioner,)	ORDER DENYING
)	PETITIONER'S MOTION FOR A
vs.)	STAY
)	
BEN CURRY, Warden,)	(Docket No. 13)
)	
Respondent.)	

Petitioner, a California state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the Board of Prison Terms' ("Board") decision denying him parole.

In the petition, petitioner raises the following claims, which this court found cognizable in its order to show cause: (1) the Board's denial of parole violated his plea agreement; and (2) the Board violated his right to equal protection under the California Constitution and the Fourteenth Amendment when it failed to consider setting his parole term and failed to fix a primary term. The court granted respondent's motion to dismiss on August 18, 2008, concluding that petitioner's equal protection claim was unexhausted.

1 Thereafter, the court ordered petitioner to either (1) file an amended petition that includes
2 only his exhausted claim and strikes the unexhausted claim, or (2) file a request for a stay of this
3 matter while he exhausts his unexhausted claim in state court. On September 4, 2008, petitioner
4 filed a letter electing to request a stay while he returned to state court to exhaust.

5 However, petitioner gives no explanation, much less “good cause” for his failure to
6 exhaust this claim in the first instance. See Rhines v. Webber, 544 U.S. 269, 277 (2005).
7 Because the court is mindful of Rhines’ instruction that district courts stay mixed petitions in
8 “limited circumstances,” see Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008),
9 petitioner’s request for a stay is DENIED.

10 As the petition is a mixed petition, containing both exhausted and unexhausted claims,
11 petitioner will be granted an opportunity to file an amended petition containing his one
12 exhausted claim. If petitioner fails to file such an amended petition according to the instructions
13 set forth below, this action will be dismissed without prejudice to filing a new petition containing
14 only unexhausted claims. However, a new petition would be time barred, absent cause for
15 equitable tolling, upon his return to federal court if he opted to dismiss the petition without
16 prejudice and return to state court to exhaust all his claims.

17 **CONCLUSION**

18 For the reasons stated above, the Court hereby orders as follows:

- 19 1. Petitioner’s request for a stay is DENIED.
20 2. This action is DISMISSED with leave to file an amended petition containing only

21 exhausted claims within **thirty (30) days** of the date this order is filed. The amended petition
22 must include the caption and civil case number used in this order (No. C 07-1576 RMW (PR))
23 and the words FIRST AMENDED PETITION on the first page.

24 **The amended petition supersedes the original petition, and petitioner may not**
25 **incorporate material from the prior petition by reference. The amended petition must only**
26 **include exhausted claims, and it must forth all the claims petitioner wishes this Court to**
27 **consider with sufficient clarity and particularity for respondent to prepare an answer. If**
28 **petitioner fails to file an amended petition in conformity with this order, this action will be**

1 **dismissed without prejudice.**

2 This order terminates Docket No. 13

3 IT IS SO ORDERED.

4 Dated: 11/17/08

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28