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E-FILED - 1/23/09

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

RICHARD JAMES JUNIEL, JR.,)
)
 Petitioner,)
)
 vs.)
)
 T. FELKNER, Warden,)
)
 Respondent.)
 _____)

No. C 07-4542 RMW (PR)

ORDER DIRECTING
PETITIONER TO FILE PROOF OF
EXHAUSTION OR AMENDED
PETITION

Petitioner, a California prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 28, 2008, the court ordered respondent to show cause why the petition should not be granted based on petitioner’s eleven cognizable claims. Respondent filed a motion to dismiss because petitioner failed to exhaust all of his claims, and petitioner filed a motion to stay the proceedings. On November 20, 2008, the court granted respondent’s motion to dismiss, denied petitioner’s motion to stay, and directed petitioner to file an amended petition containing only his exhausted claims. On December 15, 2008, petitioner filed his amended petition.

After reviewing the amended petition, petitioner included his three exhausted claims and included a fourth claim: ineffective assistance of counsel on appeal. However, it appears that the ineffective assistance of counsel claim is unexhausted. Accordingly, if petitioner believes that his ineffective assistance of counsel claim is exhausted, he shall file a copy of any previously

1 filed state pleadings that demonstrate such exhaustion within **thirty days** of the filing date of this
2 order.

3 If, however, petitioner concedes that his ineffective assistance of counsel claim has not
4 been exhausted, petitioner's amended petition is still a mixed petition, containing both exhausted
5 and unexhausted claims. Petitioner will be granted one more opportunity to file an amended
6 petition containing **only** his exhausted claims. If petitioner files another mixed petition or does
7 not file an amended petition according to the instructions set forth below, this action will be
8 dismissed without prejudice to filing a new petition containing only exhausted claims. However,
9 a new petition would be time barred, absent cause for equitable tolling, upon his return to federal
10 court if he opted to dismiss the petition without prejudice and return to state court to exhaust all
11 his claims.

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

13 1. Within **thirty (30) days** of the date this order is filed, petitioner shall either file a
14 copy of any state pleadings that demonstrate he exhausted his claim for ineffective assistance of
15 counsel OR petitioner shall file an amended petition containing only exhausted claims. The
16 amended petition must include the caption and civil case number used in this order (No. C 07-
17 4542 RMW (PR)) and the words SECOND AMENDED PETITION on the first page.

18 2. **The second amended petition supersedes previously filed petitions, and**
19 **petitioner may not incorporate material from the prior petition by reference. The**
20 **amended petition must only include exhausted claims, and it must forth all the claims**
21 **petitioner wishes this court to consider with sufficient clarity and particularity for**
22 **respondent to prepare an answer. If petitioner fails to file an amended petition in**
23 **conformity with this order, this action will be dismissed without prejudice.**

24 IT IS SO ORDERED.

25 DATED: 1/22/09

26 
27 RONALD M. WHYTE
28 United States District Judge