

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER CARREA, JR.,)	Civil No. 10cv00928 WQH(RBB)
)	
Petitioner,)	ORDER ENLARGING TIME
)	
v.)	
)	
MATTHEW CATE, Secretary,)	
California Department of)	
Corrections and Rehabilitation,)	
)	
Respondent.)	
_____)	

On May 10, 2010, this Court filed a Notice Regarding Possible Dismissal of Petition for Failure to Exhaust State Court Remedies [doc. no. 4]. Petitioner was permitted to file any opposition by June 14, 2010. To date, nothing has been filed. This Court will grant Carrea an extension.

To avoid the Court dismissing the Petition on its own accord, Carrea may choose one of the following options:

1. First Option: Demonstrate Exhaustion

Petitioner may file further papers with this Court to demonstrate that he has in fact exhausted the claim the Court has determined is likely unexhausted. If Petitioner chooses this

1 option, his papers are due no later than September 2, 2010.

2 Respondent may file a reply by September 16, 2010.

3 2. Second Option: Voluntarily Dismiss the Petition

4 Petitioner may move to voluntarily dismiss his entire federal
5 petition and return to state court to exhaust his unexhausted
6 claim. Petitioner may then file a new federal petition containing
7 only exhausted claims. See Rose v. Lundy, 455 U.S. 509, 510, 520-
8 21 (stating that a petitioner who files a mixed petition may
9 dismiss his petition to "return[] to state court to exhaust his
10 claims"). If Petitioner chooses this second option, he must file a
11 pleading with this Court no later than September 2, 2010.

12 Respondent may file a reply by September 16, 2010.

13 Petitioner is cautioned that any new federal petition must be
14 filed before expiration of the one-year statute of limitations.
15 Ordinarily, a petitioner has one year from when his conviction
16 became final to file his federal petition, unless he can show that
17 statutory or equitable "tolling" applies. Duncan v. Walker, 533
18 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).¹ The statute of

19 ¹ 28 U.S.C. § 2244(d) provides:

20 (1) A 1-year period of limitation shall apply to an application for
21 a writ of habeas corpus by a person in custody pursuant to the
22 judgment of a State court. The limitation period shall run from
23 the latest of --

24 (A) the date on which the judgment became final by the
25 conclusion of direct review or the expiration of the time for
26 seeking such review;

27 (B) the date on which the impediment to filing an application
28 created by State action in violation of the Constitution or laws of
the United States is removed, if the applicant was prevented from
filing by such State action;

(C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been
newly recognized by the Supreme Court and made retroactively
application to cases on collateral review; or

(D) the date on which the factual predicate of the claim or
claims presented could have been discovered through the exercise of
due diligence.

1 limitations does not run while a properly filed state habeas corpus
2 petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza,
3 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531
4 U.S. 4, 8 (2000) (holding that "an application is 'properly filed'
5 when its delivery and acceptance [by the appropriate court officer
6 for placement into the record] are in compliance with the
7 applicable laws and rules governing filings."); Bonner v. Carey,
8 425 F.3d 1145, 1149 (9th Cir. 2005) (holding that a state
9 application for post-conviction relief which is ultimately
10 dismissed as untimely was neither "properly filed" nor "pending"
11 while it was under consideration by the state court and, therefore,
12 does not toll the statute of limitations), as amended 439 F.3d 993.
13 However, absent some other basis for tolling, the statute of
14 limitations continues to run while a federal habeas petition is
15 pending. Duncan, 533 U.S. at 181-82.

16 3. Third Option: Formally Abandon Unexhausted Claim

17 Petitioner may formally abandon his unexhausted claim and
18 proceed with his exhausted ones. See Rose, 455 U.S. at 510, 520-21
19 (stating that a petitioner who files a mixed petition may
20 "resubmit[] the habeas petition to present only exhausted claims").
21 If Petitioner chooses this third option, he must file a pleading
22 with this Court no later than September 2, 2010. Respondent may
23 file a reply by September 16, 2010.

24 Petitioner is cautioned that once he abandons his unexhausted
25 claim, he may lose the ability to ever raise it in federal court.

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27 (2) The time during which a properly filed application for State
28 post-conviction or other collateral review with respect to the
pertinent judgment or claim is pending shall not be counted toward
any period of limitation under this subsection.

1 See Slack v. McDaniel, 529 U.S. 473, 488 (2000) (stating that a
2 court's ruling on the merits of claims presented in a first § 2254
3 petition renders any later petition successive); see also §
4 2244(a)-(b).²

5 4. Fourth Option: File a Motion to Stay the Federal
6 Proceedings

7 Petitioner may file a motion to stay this federal proceeding
8 while he returns to state court to exhaust his unexhausted claim.
9 There are two methods available to Petitioner, the "stay and
10 abeyance" procedure and the "withdrawal and abeyance" procedure.

11 If Petitioner wishes to use the "stay and abeyance" procedure,
12 he should ask the Court to stay his mixed petition while he returns
13 to state court to exhaust. Under this procedure, he must
14 demonstrate there are arguably meritorious claims which he wishes
15 to return to state court to exhaust, that he is diligently pursuing
16 his state court remedies with respect to that claim, and that good
17 cause exists for his failure to timely exhaust his state court
18 remedies. Rhines v. Webber, 544 U.S. 269, 277-78 (2005).

19 If Petitioner wishes to use the "withdrawal and abeyance"
20 procedure, he must voluntarily withdraw his unexhausted claim, ask
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22 ² 28 U.S.C. § 2244(b)(2) provides that a claim presented in a
23 second or successive habeas corpus application under § 2254 shall
be dismissed unless:

24 (A) the applicant shows that the claim relies on a new rule
of constitutional law, made retroactive to cases on collateral
review by the Supreme Court, that was previously unavailable; or

25 (B)(i) the factual predicate for the claim could not have
26 been discovered previously through the exercise of due diligence;
and

27 (ii) the facts underlying the claim, if proven and viewed
in light of the evidence as a whole, would be sufficient to
28 establish by clear and convincing evidence that, but for
constitutional error, no reasonable factfinder would have found the
applicant guilty of the underlying offense.

1 the Court to stay the proceedings and hold the fully-exhausted
2 petition in abeyance while he returns to state court to exhaust,
3 and then seek permission to amend his petition to include the newly
4 exhausted claim after exhaustion is complete. King v. Ryan, 564
5 F.3d 1133, 1141-42 (9th Cir. 2009). Although under this procedure,
6 Petitioner is not required to demonstrate good cause for his
7 failure to timely exhaust, the newly exhausted claim must be either
8 timely under the statute of limitations or "relate back" to the
9 claim in the fully-exhausted petition, that is, they must share a
10 "common core of operative facts" with the previously exhausted
11 claim(s). Id. at 1142-43, quoting Mayle v. Felix, 545 U.S. 644,
12 659 (2005).

13 If Petitioner chooses this fourth option, he must file a
14 pleading with this Court no later than September 2, 2010.
15 Respondent may file a reply by September 16, 2010.

16 3. CONCLUSION

17 The Court NOTIFIES PETITIONER THAT HE HAS FILED A PETITION
18 THAT CONTAINS BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS, AND IT IS
19 THEREFORE SUBJECT TO DISMISSAL. If Petitioner fails to respond to
20 this Order, the Court will recommend to the District Judge assigned
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1 to this case that the Petition be dismissed without prejudice.³

2 See Rose, 455 U.S. at 522.

3 IT IS SO ORDERED.

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5 DATED: August 2, 2010


Ruben B. Brooks
UNITED STATES MAGISTRATE JUDGE

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27 ³ Although the dismissal is "without prejudice," Petitioner
28 is again cautioned that any later federal petition may be barred by
the statute of limitations. See 28 U.S.C. § 2244(d)(1)-(2); see
also footnote one of this Order.