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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MARTIN PONCE RAMIREZ,
12 Petitioner,
13 v.
14 GLEN E. PRATT, Warden,
15 Respondent.

Case No.: 23-CV-2175 JLS (KSC)

**ORDER (1) GRANTING MOTION TO
AMEND PETITION AND (2)
DISMISSING SECOND AMENDED
PETITION WITHOUT PREJUDICE**

(ECF No. 6)

17 On November 24, 2023, Petitioner Martin Ponce Ramirez, a state prisoner
18 proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.
19 See ECF No. 1. On December 5, the Court dismissed the case without prejudice based on
20 Petitioner's failure to satisfy the filing fee requirement and failure to exhaust all claims in
21 the Petition. See ECF No. 2. The Court notified Petitioner that to proceed with the instant
22 habeas case, he must, on or before January 25, 2024, pay the \$5.00 filing fee or move to
23 proceed *in forma pauperis* ("IFP"), and also choose one of the four options outlined, which
24 included: (1) demonstrate exhaustion, (2) voluntarily dismiss the petition, (3) formally
25 abandon unexhausted claims, or (4) file a motion to stay the federal proceedings. See *id.*

26 On January 2, 2024, Petitioner filed a second habeas petition pursuant to 28 U.S.C.
27 § 2254, which was docketed as an Amended Petition. See ECF No. 3. In its
28 January 16, 2024 Order, the Court noted that the Amended Petition appeared to repeat the

1 same four claims for relief from the original Petition in a different sequential order, but that
2 a review of the attached habeas petition filed in the California Supreme Court appeared to
3 reflect that state court remedies had not been exhausted as to each of the four claims alleged
4 and Petitioner also had not satisfied the filing fee requirement. *See* ECF No. 4. Given
5 Petitioner’s attempted response to the Court’s December 5, 2023 Order, the Court *sua*
6 *sponte* extended the deadline for Petitioner to both (1) choose an option and (2) satisfy the
7 filing fee requirement to February 29, 2024. *See id.* On January 30, 2024, Petitioner paid
8 the \$5.00 filing fee. *See* ECF No. 5.

9 Meanwhile, on January 23, 2024, instead of submitting a filing in which Petitioner
10 chose an option in the instant case, Petitioner constructively filed a second habeas corpus
11 petition pursuant to 28 U.S.C. § 2254 seeking to challenge the same conviction and
12 sentence as in the instant habeas action. *See* ECF No. 1 (the “Petition” or “Second
13 Amended Petition”) in *Ramirez v. Pratt, et al.*, S.D. Cal. Civil Case No. 24-CV-232 AGS
14 (DEB).¹ In *Woods v. Carey*, the Ninth Circuit held that when a pro se petitioner has a
15 28 U.S.C. § 2254 petition pending in a district court and files a new 28 U.S.C. § 2254
16 petition challenging the same conviction, “the district court should . . . construe[] [the
17 petitioner’s] pro se habeas petition as a motion to amend his pending habeas petition.”
18 525 F.3d 886, 890 (9th Cir. 2008). Because the instant case was pending before the Court
19 when Petitioner constructively filed the instant Petition on January 23, 2024, the Court is
20 required to construe the Petition as a motion to amend in the instant case. *See id.*

21 On April 3, 2024, Judge Schopler ordered that the Petition filed in S.D. Cal. Civil
22 Case No. 24-CV-232 AGS (DEB) be construed as a motion to amend the petition in this
23 case. *See* ECF No. 4 in *Ramirez v. Pratt, et al.*, S.D. Cal. Civil Case No. 24-CV-232 AGS
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¹ The federal Petition is filed-stamped February 2, 2024, but under the “mailbox rule” the constructive
filing date is the date Petitioner handed it to correctional officers for mailing to the Court, which Petitioner
indicates is January 23, 2024. *See* ECF No. 1 at 11–13 in S.D. Cal. Civil Case No. 24-CV-232 AGS
(DEB); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001) (“Under the ‘prison mailbox rule’ of
Houston v. Lack, 487 U.S. 266 (1988), a prisoner’s federal habeas petition is deemed filed when he hands
it over to prison authorities for mailing to the district court.”) (internal citations omitted).

1 (DEB). So construed, the Court **GRANTS** the motion to amend the petition (ECF No. 6)
2 and **DIRECTS** the Clerk to refile the Petition in S.D. Cal. Civil Case No. 24-CV-232 AGS
3 (DEB) as a Second Amended Petition in the instant case.

4 **PETITION SCREENING**

5 With respect to the instant habeas case, Petitioner has now satisfied the filing fee
6 requirement by paying the \$5.00 filing fee. *See* ECF No. 5. Moreover, Petitioner has also
7 indicated his choice of option in accordance with the Court’s January 16, 2024 Order,
8 stating that: “I am choosing the First Option. I am including proof that in fact I have
9 exhausted all claims in the petition.” ECF No. 6 at 14.

10 Upon review, Petitioner again repeats the same four claims for relief previously
11 raised in both the original Petition and in the Amended Petition. However, yet again, the
12 Court’s review of Petitioner’s submitted exhibits in support of his attempt to demonstrate
13 exhaustion reflect that the instant Second Amended Petition is a mixed petition. While the
14 attached exhibits reflect that Claims 1 through 3 were raised in the California Supreme
15 Court and appear exhausted, those same exhibits do not reflect that he presented Claim 4
16 to the California Supreme Court and as such, Petitioner fails to demonstrate exhaustion as
17 to Claim 4. *See id.* at 58–63.

18 Because Petitioner has twice been advised of the need to demonstrate complete
19 exhaustion to proceed with option one, *see* ECF No. 2 at 2; ECF No. 4 at 3, and has twice
20 failed to do so, it appears clear he is unable to demonstrate exhaustion of state court
21 remedies as to all claims raised as required to proceed. While the Court will provide
22 Petitioner one final opportunity to proceed with this action by choosing an option,
23 Petitioner now has only three options to choose from.

24 **I. First Option: Voluntarily Dismiss the Petition**

25 Petitioner may move to voluntarily dismiss his entire federal petition and return to
26 state court to exhaust his unexhausted claim(s). Petitioner may then file a new federal
27 petition containing only exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520–21
28 (1982) (stating that a petitioner who files a mixed petition may dismiss his petition to

1 “return[] to state court to exhaust his claims”). If Petitioner chooses this first option, he
2 must file a pleading notifying the Court of his choice no later than **June 18, 2024**.

3 Petitioner is again cautioned that any new federal petition must be filed before the
4 expiration of the one-year statute of limitations. Ordinarily, a petitioner has one year from
5 when his conviction became final to file his federal petition, unless he can show that
6 statutory or equitable “tolling” applies. *Duncan v. Walker*, 533 U.S. 167, 176 (2001);
7 28 U.S.C. § 2244(d). The statute of limitations does not run while a properly filed state
8 habeas corpus petition is pending. *Id.* § 2244(d)(2); *see also Nino v. Galaza*,
9 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000)
10 (holding “an application is ‘properly filed’ when its delivery and acceptance [by the
11 appropriate court officer for placement into the record] are in compliance with the
12 applicable laws and rules governing filings”); *Bonner v. Carey*, 425 F.3d 1145, 1149
13 (9th Cir. 2005) (holding state application for post-conviction relief which is ultimately
14 dismissed as untimely was neither “properly filed” nor “pending” while under
15 consideration in state court, and thus does not toll the statute of limitations), *as amended*,
16 439 F.3d 993. But absent some other basis for tolling, the statute of limitations continues
17 to run while a federal habeas petition is pending. *Duncan*, 533 U.S. at 181–82.

18 **II. Second Option: Formally Abandon Unexhausted Claims**

19 Petitioner may formally abandon his unexhausted claim(s) and proceed with his
20 exhausted ones. *See Rose*, 455 U.S. at 510, 520–21 (stating a petitioner who files a mixed
21 petition may “resubmit[] the habeas petition to present only exhausted claims”). If
22 Petitioner chooses this second option, he must file a pleading with this Court no later than
23 **June 18, 2024**. Petitioner is cautioned that once he abandons his unexhausted claim(s), he
24 may lose the ability to ever raise them in federal court. *See Slack v. McDaniel*,
25 529 U.S. 473, 488 (2000) (stating court’s ruling on the merits of claims presented in a first
26 § 2254 petition renders any later petition successive); *see also* 28 U.S.C. § 2244(a)–(b).

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1 **III. Third Option: File a Motion to Stay the Federal Proceedings**

2 Petitioner may file a motion to stay this federal proceeding while he returns to state
3 court to exhaust his unexhausted claim(s). There are two methods available to Petitioner:
4 the “stay and abeyance” procedure and the “withdrawal and abeyance” procedure.

5 If Petitioner wishes to use the “stay and abeyance” procedure he must ask the Court
6 to stay his mixed petition while he returns to state court to exhaust. Under this procedure
7 he must demonstrate there are arguably meritorious claim(s) which he wishes to return to
8 state court to exhaust, that he is diligently pursuing his state court remedies with respect to
9 those claim(s), and that good cause exists for his failure to timely exhaust his state court
10 remedies. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005).

11 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must
12 voluntarily withdraw his unexhausted claim(s), ask the Court to stay the proceedings and
13 hold the fully exhausted petition in abeyance while he returns to state court to exhaust, and
14 then seek permission to amend his petition to include the newly exhausted claim(s) after
15 exhaustion is complete. *King v. Ryan*, 564 F.3d 1133, 1141–42 (9th Cir. 2009). Although
16 under this procedure Petitioner is not required to demonstrate good cause for his failure to
17 timely exhaust, the newly exhausted claim(s) must be either timely under the statute of
18 limitations or “relate back” to the claims in the fully-exhausted petition—*i.e.*, they must
19 share a “common core of operative facts” with the previously exhausted claim(s). *Id.*
20 at 1142–43 (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)). If Petitioner chooses this
21 third option, he must file a pleading with this Court no later than **June 18, 2024**.

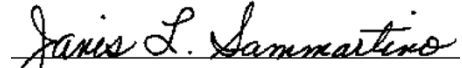
22 **CONCLUSION AND ORDER**

23 For the reasons above, the Court **GRANTS** the Motion to Amend the Petition (ECF
24 No. 6) and **DIRECTS** the Clerk to refile the Petition in S.D. Cal. Civil Case No. 24-CV-
25 232 AGS (DEB) as a Second Amended Petition in the instant case. Additionally, the Court
26 **DISMISSES** the Second Amended Petition without prejudice for failure to exhaust state
27 court remedies as to all claims raised. If Petitioner wishes to proceed with this case, he
28 must, no later than **June 18, 2024**, choose one of the three options outlined above.

1 Petitioner is cautioned that if he fails to respond to this Order, the case will remain
2 dismissed without prejudice. *See Rose*, 455 U.S. at 522.

3 **IT IS SO ORDERED.**

4 Dated: April 18, 2024

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6 Hon. Janis L. Sammartino
7 United States District Judge
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