

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

Murillo v. Smith

No. 25-cv-91-RSH-MSB (S.D. Cal. Feb. 25, 2025) · No. 25-cv-91-RSH-MSB · Decided February 25, 2025

SUMMARY

The United States District Court for the Southern District of California grants Joaquin Murillo's motion to proceed in forma pauperis in his 28 U.S.C. § 2254 habeas petition. The Court finds that the petition appears to include unexhausted claims and notifies him of four options to avoid dismissal, with a response deadline of April 9, 2025.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 JOAQUIN MURILLO, Case No.: 25-cv-91-RSH-MSB 12 Petitioner,
ORDER: 13 v. (1) GRANTING MOTION TO PROCEED IN 14 STEPHEN SMITH, et al.,
FORMA PAUPERIS AND 15 Respondents.

(2) NOTIFYING PETITIONER OF 16 OPTIONS TO AVOID DISMISSAL OF 17 PETITION 18
[ECF Nos. 1-2] 19 20 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of
Habeas 21 Corpus pursuant to 28 U.S.C. § 2254, challenging a San Diego County Superior Court
22 judgment of conviction and resentencing in case number SCD189155. ECF No. 1. 23
Petitioner has also filed a motion for leave to proceed in forma pauperis.

ECF No. 2. For 24 the reasons discussed, the Court GRANTS the motion to proceed in forma
pauperis and 25 NOTIFIES Petitioner of his options to avoid a future dismissal of the instant
habeas action. 26 MOTION TO PROCEED IN FORMA PAUPERIS 27 Petitioner has \$1.01 on
account at the California correctional institution in which he 28 is presently confined [see ECF
No. 2 at 4-5], and cannot afford the \$5.00 filing fee.

1 Accordingly, the Court GRANTS Petitioner's motion to proceed in forma pauperis and 2 allows
him to prosecute the above-referenced action without being required to prepay fees 3 or costs and
without being required to post security.

The Clerk of Court will file the Petition 4 without prepayment of the filing fee. 5 FAILURE TO
EXHAUST STATE COURT REMEDIES 6 Upon review, it does not appear that Petitioner has
exhausted state court remedies 7 as to all of the seven enumerated claims in the Petition. Habeas
petitioners who wish to 8 challenge either their state court conviction or the length of their
confinement in state 9 prison must first exhaust state judicial remedies.

See 28 U.S.C. § 2254(b), (c); *Granberry 10 v. Greer*, 481 U.S. 129, 133-34 (1987); see also *Picard v. Connor*, 404 U.S. 270, 275 (1971) 11 (“[A] state prisoner must normally exhaust available state judicial remedies before a federal 12 court will entertain his petition for habeas corpus.”). “A petitioner has satisfied the 13 exhaustion requirement if: (1) he has ‘fairly presented’ his federal claim to the highest state 14 court with jurisdiction to consider it,” which in this case is the California Supreme Court, 15 “or (2) he demonstrates that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 16 828, 829 (9th Cir.

1996) (citations omitted); see also *O’Sullivan v. Boerckel*, 526 U.S. 838, 17 845 (1999) (“[S]tate prisoners must give the state courts one full opportunity to resolve any 18 constitutional issues by invoking one complete round of the State’s established appellate 19 review process.”). 20 Additionally, the claims presented in the federal courts must be the same as those 21 exhausted in state court and a petitioner must also allege, in state court, how one or more 22 of his federal rights have been violated.

See *Picard*, 404 U.S. at 276 (“Only if the state 23 courts have had the first opportunity to hear the claim sought to be vindicated in a federal 24 habeas proceeding does it make sense to speak of the exhaustion of state remedies. 25 Accordingly, we have required a state prisoner to present the state courts with the same 26 claim he urges upon the federal courts.”); see also *Duncan v. Henry*, 513 U.S. 364, 365-66 27 (1995) (“If state courts are to be given the opportunity to correct alleged violations of 28 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are 1 asserting claims under the United States Constitution.

If a habeas petitioner wishes to claim 2 that an evidentiary ruling at a state court trial denied him the due process of law guaranteed 3 by the Fourteenth Amendment, he must say so, not only in federal court, but in state 4 court.”). 5 Here, Petitioner alleges that he raised Grounds One through Four, which allege 6 violations of cruel and unusual punishment, double jeopardy, equal protection, and illegal 7 sentence/wrongful conviction, respectively, in a petition for review filed in the California 8 Supreme Court.

See ECF No. 1 at 6, 8-10. However, Petitioner does not indicate whether 9 he raised Grounds Five through Seven, which present claims concerning the Supremacy 10 Clause, alleged ineffective assistance of counsel, and asserted due process violations, 11 respectively, in the California Supreme Court.¹ See *id.* at 13-19. 12 In *Rose v. Lundy*, 455 U.S. 509 (1982), the United States Supreme Court held that a 13 petition which did not contain only exhausted claims is subject to dismissal because it 14 violates the “total exhaustion rule” required in habeas petitions brought pursuant to § 2254, 15 but that a petitioner must be permitted an opportunity to cure that defect prior to dismissal.

16 *Id.* at 514-20. Here, given that Petitioner does not allege that he has exhausted all of his 17 claims, the Court notifies Petitioner of his options to proceed. 18 I. First Option: Demonstrate

Exhaustion 19 Petitioner may file papers in which he demonstrates he has exhausted all claims in 20 the Petition. If Petitioner chooses this option, these papers are due no later than April 9, 21 2025.

22 // 23 24 25 1 In a separate section of the habeas form, Petitioner generally indicates that he raised an alleged due process violation in his California Supreme Court petition for review [see 26 id. at 2], but he does not specifically indicate that he presented Ground Seven in that 27 petition. Even were the Court inclined to find Petitioner alleged exhaustion as to Ground Seven, the Petition remains mixed because he fails to allege exhaustion as to Grounds Five 28 1 II.

Second Option: Voluntarily Dismiss the Petition 2 Petitioner may move to voluntarily dismiss his entire federal petition and return to 3 state court to exhaust his unexhausted claims. Petitioner may then file a new federal petition 4 containing only exhausted claims. See Lundy, 455 U.S. at 510, 520-21 (stating that a 5 petitioner who files a mixed petition may dismiss his petition to “return[] to state court to 6 exhaust his claims”).

7 Petitioner is cautioned that any new federal petition must be filed before expiration 8 of the one-year statute of limitations. Ordinarily, a petitioner has one year from when his 9 conviction became final to file his federal petition, unless he can show that statutory or 10 equitable “tolling” applies. *Duncan v. Walker*, 533 U.S. 167, 176 (2001); 28 U.S.C. 11 § 2244(d).² The statute of limitations does not run while a properly filed state habeas corpus 12 13 2 28 U.S.C. § 2244 (d) provides: 14 (1) A 1-year period of limitation shall apply to an application for a writ of 15 habeas corpus by a person in custody pursuant to the judgment of a State court.

The limitation period shall run from the latest of-- 16 (A) the date on which the judgment became final by the conclusion of 17 direct review or the expiration of the time for seeking such review; 18 (B) the date on which the impediment to filing an application created 19 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 20 State action; 21 (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly 22 recognized by the Supreme Court and made retroactively applicable to 23 cases on collateral review; or 24 (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due 25 diligence.

26 (2) The time during which a properly filed application for State post- 27 conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation 28 1 petition is pending. 28 U.S.C. § 2244(d)(2); see also *Nino v. Galaza*, 183 F.3d 1003, 1006 2 (9th Cir. 1999); but see *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application 3 is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for 4 placement into the record] are in compliance with the applicable laws and rules governing 5 filings”); *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir.

2005) (holding that a state 6 application for post-conviction relief which is ultimately dismissed as untimely was neither 7 “properly filed” nor “pending” while it was under consideration by the state court, and 8 therefore does not toll the statute of limitations), as amended, 439 F.3d 993.

However, 9 absent some other basis for tolling, the statute of limitations continues to run while a federal 10 habeas petition is pending. *Duncan*, 533 U.S. at 181-82. 11 If Petitioner chooses this second option, he must file a voluntary dismissal with this 12 Court no later than April 9, 2025. 13 III.

Third Option: Formally Abandon Unexhausted Claims 14 Petitioner may formally abandon his unexhausted claim(s) and proceed with those 15 claims that he alleges he has exhausted. See *Lundy*, 455 U.S. at 510, 520-21 (stating that a 16 petitioner who files a mixed petition may “resubmit[] the habeas petition to present only 17 exhausted claims”). If Petitioner chooses this third option, he must file a pleading with this 18 Court no later than April 9, 2025.

Petitioner is cautioned that once he abandons his 19 unexhausted claim(s), he may lose the ability to ever raise them in federal court. See *Slack 20 v. McDaniel*, 529 U.S. 473, 488 (2000) (stating that a court’s ruling on the merits of claims 21 presented in a first § 2254 petition renders any later petition successive); see also 28 U.S.C. 22 § 2244 (a)-(b).

23 IV. Fourth Option: File a Motion to Stay the Federal Proceedings 24 Petitioner may file a motion to stay this federal proceeding while he returns to state 25 court to exhaust his unexhausted claim(s). There are two methods available to Petitioner: 26 the “stay and abeyance” procedure and the “withdrawal and abeyance” procedure. 27 If Petitioner wishes to use the “stay and abeyance” procedure he must ask the Court 28 to stay his mixed petition while he returns to state court to exhaust.

Under this procedure 1 must demonstrate there are arguably meritorious claim(s) which he wishes to return to 2 || state court to exhaust, that he is diligently pursuing his state court remedies with respect to 3 ||those claim(s), and that good cause exists for his failure to timely exhaust his state court 4 ||remedies. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

5 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must 6 || voluntarily withdraw his unexhausted claim(s), ask the Court to stay the proceedings and 7 ||hold the fully exhausted petition in abeyance while he returns to state court to exhaust, and 8 ||then seek permission to amend his petition to include the newly exhausted claim(s) after 9 || exhaustion is complete.

King v. Ryan, 564 F.3d 1133, 1141-42 (9th Cir. 2009). Although 10 || under this procedure Petitioner is not required to demonstrate good cause for his failure to 11 timely exhaust, the newly exhausted claim(s) must be either timely under the statute of 12 || limitations or “relate back” to

the claims in the fully-exhausted petition—i.e., they must 13 ||share a “common core of operative facts” with the previously exhausted claim(s).

Id. at 14 || 1142-43 (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)). If Petitioner chooses this 15 || fourth option, he must file a pleading with this Court no later than April 9, 2025. 16
CONCLUSION AND ORDER 17 For the foregoing reasons, the Court GRANTS Petitioner’s motion to proceed in 18 || *forma pauperis* [ECF No. 2], and NOTIFIES Petitioner that his Petition as currently 19 || drafted is subject to dismissal for failure to allege exhaustion of state court remedies.

If 20 || Petitioner wishes to proceed with this habeas action, he must, no later than April 9, 2025, 21 ||notify the Court which of the options outlined above he chooses. Petitioner is cautioned 22 if he fails to respond to this Order, the Petition will be dismissed without prejudice. 23 || See *Lundy*, 455 U.S. at 522. 24 ||IT IS SO ORDERED. ebut C [had 25 February 25, 2025 26 Honorable Robert S. Huie United States District Judge 28