

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Kenneth Moore v. Jeffery McComber, et al.

Moore v. McComber · No. 25-cv-03458 EJD (PR) · Decided November 17, 2025

OPINION

Moore

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 KENNETH MOORE, Case No. 25-cv-03458 EJD (PR) 7 Petitioner, ORDER OF DISMISSAL 8
v. 9 JEFFERY MCCOMBER, et al., 10 Respondents. 11 12 Petitioner, a state prisoner proceeding
pro se, filed a petition for a writ of habeas 13 corpus pursuant to 28 U.S.C. § 2254, challenging his
state conviction. Dkt. No. 1. On

14 October 3, 2025, the Court directed Petitioner to file notice regarding the exhaustion of
15 state judicial remedies because it was not clear from the petition whether Petitioner had 16
presented all the claims he was attempting to raise in this action to the California Supreme 17
Court before filing this action. Dkt. No. 12. Petitioner filed a response. Dkt. No. 13.

18 BACKGROUND

19 According to the petition, Petitioner was found guilty of first degree murder with 20 special
circumstances, and sentenced on May 7, 1980, to life without the possibility of 21 parole in state
prison. Dkt. No. 1 at 1. He appealed the matter, and the state high court 22 denied review on April
9, 2003.1 23 Petitioner attached multiple supporting documents to the petition, including a copy
24 of a state habeas petition filed on November 5, 2024. Dkt. No. 5-1 at 46 (Ex. G). He also 25
indicates that he has a pending petition for resentencing under Penal Code section 1172.1 26 in
Alameda County Superior Court. Dkt. No. 1 at 4. 27 1 Petitioner filed the instant petition on April
18, 2025. Dkt. No. 1.

2 DISCUSSION

3 A. Exhaustion 4 Prisoners in state custody who wish to challenge collaterally in federal habeas 5
proceedings either the fact or length of their confinement are first required to exhaust state 6
judicial remedies, either on direct appeal or through collateral proceedings, by presenting 7 the
highest state court available with a fair opportunity to rule on the merits of each and 8 every claim
they seek to raise in federal court. See 28 U.S.C. § 2254(b)-(c). If available 9 state remedies have
not been exhausted as to all claims, the district court must dismiss the 10 petition. *Duckworth v.*
Serrano, 454 U.S. 1, 3-5 (1981). Before he may challenge either 11 the fact or length of his

confinement in a habeas petition in this Court, petitioner must 12 present to the California Supreme Court any claims he wishes to raise in this court. See 13 *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding every claim raised in federal habeas 14 petition must be exhausted). If available state remedies have not been exhausted as to all 15 claims, the district court must dismiss the petition. See *id.*, 455 U.S. at 510; *Guizar v. 16 Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). 17 In the last court order, the Court stated that it was unclear what claims Petitioner 18 was attempting to raise in this action as he merely referred to numerous attachments to the 19 petition (totaling 561 pages) without identifying the claims therein. Dkt. No. 12 at 2. The 20 attached papers included documents from his original criminal trial as well as the most 21 recent petition for resentencing which was still pending in superior court. *Id.* As such, it 22 was not clear whether Petitioner had presented all the claims to the state high court before 23 filing suit. *Id.* Petitioner was therefore directed to file notice that he had presented all the 24 claims in the instant action to the California Supreme Court and whether the state high 25 court issued a decision. *Id.* at 2-3. 26 Petitioner has filed a notice wherein he admits that he has not exhausted all his 27 claims because he believes that he “cannot receive a fair and impartial hearing in state 1 “has well-settled authority, especially under the set of facts and circumstances described 2 herein, to find that exhaust of petitioner’s state judicial remedies are in fact futile.” *Id.* at 3 3. He alleges “that due to ongoing racial bias, conflicts of interest and stall-tactics being 4 carried out by both judges and prosecutors in Alameda County” that he “cannot/will not 5 receive a timely, fair and/or impartial hearing regarding his Batson/Wheeler violations.”

6 *Id.* at 4. Petitioner states that his claims challenging his underlying conviction “have NOT 7 been fully exhausted by the State Supreme Court.” *Id.* 8 Although he asserts that the Court has “well-settled authority” to find that 9 exhaustion is futile, Petitioner submits no caselaw in support of this argument. Rather, the 10 Ninth Circuit’s “futility doctrine” is narrow and applies “if the highest state court has 11 recently addressed the issue raised in the petition and resolved it adversely to the 12 petitioner, in the absence of intervening United States Supreme Court decision on point or 13 any other indication that the state court intends to depart from its prior decisions.” *Sweet 14 v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). Petitioner does not assert futility based on a 15 recent adverse state high court decision that involved the same issue raised in his petition. 16 Rather, Petitioner merely believes that he will not be able to receive a favorable result. 17 However, the Supreme Court later observed (in the procedural default context) that a 18 petitioner ““may not bypass the state courts simply because [s]he thinks they will be 19 unsympathetic to the claim.”” *Alfaro v. Johnson*, 862 F.3d 1176, 80-81 (9th Cir. 2017) 20 (quoting *Engle v. Isaac*, 456 U.S. 107, 130 (1982)). 21 The exhaustion-of-state-remedies doctrine reflects a policy of federal-state comity 22 to give the state “the initial ‘opportunity to pass upon and correct alleged violations of its 23 prisoners’ federal rights.’” *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citations omitted). 24 The exhaustion requirement is satisfied only if the federal claim (1) has been “fairly 25 presented” to the state courts, see *id.*; *Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir.

1996); or 26 (2) no state remedy remains available, see *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 27 1996). Petitioner admits that he did not present his claims to the state high court. 1 || rule on Petitioner's claims. Nor can it be said that "no state remedy remains available" as 2 || Petitioner clearly states that he decided to file directly with this Court rather than continue 3 || in the state courts. Dkt. No. 13 at 2. 4 Petitioner did not present the claims from the instant petition to the California 5 || Supreme Court before filing this action. Therefore, the petition is not ripe for federal 6 || review because Petitioner has still not exhausted his state judicial remedies. See *Rose*, 455 7 || U.S. at 522. Therefore, this petition must be dismissed without prejudice to Petitioner 8 || filing a new federal habeas corpus petition once state remedies have been exhausted.

9 CONCLUSION

10 For the foregoing reasons, the petition for writ of habeas corpus is DISMISSED for 11 failure to exhaust state remedies. See *Rose*, 455 U.S. at 510. The dismissal is without prejudice to Petitioner refiling once he has exhausted state judicial remedies, i.e., the state 13. || supreme court issues a decision denying relief.

IT IS SO ORDERED. 3 15 || Dated: November 17, 2025 a 16 United States District Judge Z 18 19 20 21 22 23 24 25 26 27 28