UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 27 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE ABRAHAM GUZMAN, Petitioner-Appellant, v. KELLY SANTORO, Acting Warden, Respondent-Appellee.	No. 18-56494 D.C. No. 5:15-cv-01197-DOC-JC Central District of California, Riverside ORDER

Before: LEAVY and W. FLETCHER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE ABRAHAM GUZMAN, Petitioner, v. KELLY SANTORO, Respondent.	Case No. EDCV 15-1197 DOC(JC) ORDER DENYING A CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial by a United States District Judge of an application for a writ of habeas corpus in which the detention complained of arises from process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b).

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to applicant."

"A certificate of appealability may issue . . .only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing . . .includes showing that reasonable jurists

could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted); see also Sassounian v. Roe, 230 F.3d 1097, 1101 (9th Cir. 2000). Thus, "[w]here a district court has rejected the constitutional claims on the merits, . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484. However, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

529 U.S. at 485.

Here, the Court has adopted the Magistrate Judge's finding and conclusion that the Petition for a Writ of Habeas Corpus should be denied in part on procedural grounds and in part the merits and a final judgment adverse to the petitioner has been entered.

In accordance with 28 U.S.C. § 2253(c)(2), the Court finds that petitioner has not made the requisite substantial showing of a denial of a constitutional right with respect to the grounds for relief set forth in the Petition which were rejected

on the merits. The Court further finds that petitioner has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" with respect to the grounds for relief set forth in the Petition which were rejected on procedural grounds.

THEREFORE, pursuant to 28 U.S.C. § 2253, a certificate of appealability is denied.

DATED: September 24, 2018

David O. Carter

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE ABRAHAM GUZMAN, Petitioner, v. KELLY SANTORO, Respondent.	Case No. EDCV 15-1197 DOC(JC) JUDGMENT

Pursuant to this Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus by a Person in State Custody is denied and this action is dismissed with prejudice.

IT IS SO ADJUDGED.

DATED: September 24, 2018

David O. Carter

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE ABRAHAM GUZMAN, Petitioner, v. KELLY SANTORO, Respondent.	Case No. EDCV 15-1197 DOC(JC) ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") and all of the records herein, including the August 20, 2018 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"). The Court approves and accepts the Report and Recommendation.

IT IS HEREBY ORDERED that the Petition is denied, this action is dismissed with prejudice and Judgment be entered accordingly.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on petitioner and on respondent's counsel.

IT IS SO ORDERED.

DATED: September 24, 2018

David O. Carter

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE ABRAHAM GUZMAN, Petitioner, v. KELLY SANTORO, Respondent.	Case No. EDCV 15-1197 DOC(JC) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On June 11, 2015, petitioner Jose Abraham Guzman ("petitioner") signed and is deemed to have constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition") with attachments including a memorandum ("Petition Memo ") and exhibits ("Petition Ex.").[1] Petitioner concurrently filed a Request for Stay and Abeyance ("Motion to

[1]The proof of service attached to the Petition inexplicably reflects that it was placed in the prison mailbox on June 9, 2015 – two days before petitioner signed it. The Petition was (continued...)

Stay"). The Petition challenges a 2011 conviction in San Bernardino County Superior Court, on the following essential grounds: (1) petitioner's trial counsel was ineffective in failing to request a voluntary intoxication instruction (Ground One); the trial court committed reversible error by (2) omitting pertinent portions of CALCRIM 505 in its instructions to the jury (Ground Two), (3) failing adequately to instruct the jury on defense of others in element 1 of its CALCRIM 505 instruction (Ground Three), and (4) failing to instruct the jury as part of its CALCRIM 571 voluntary manslaughter instruction that Erika Valle was one of the people upon whom petitioner's imperfect self-defense of another contention was predicated (Ground Four); (5) the evidence was insufficient to support his first degree murder conviction (Ground Five); and (6) petitioner's appellate counsel was ineffective in failing to raise Grounds Two through Five on direct appeal (Ground Six). (Petition at 5-6a;[2] Petition Memo at 1, 8-26).

The Petition affirmatively reflects that Ground One has been exhausted, but that Grounds Two through Six have not been exhausted. (Petition at 5-7). Petitioner, who recognizes that the Petition is "mixed," seeks to stay the Petition and this action pending his exhaustion of the unexhausted claims.

For the reasons discussed below, the Motion to Stay should be denied to the extent it seeks a stay of the Petition in its current "mixed" form under Rhines v. Weber, 544 U.S. 269 (2005), and conditionally granted to the extent it seeks a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). More specifically, petitioner should be granted a Kelly stay and this action should be held in abeyance, if petitioner timely amends the Petition to delete his unexhausted claims. The Court

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[1](...continued)
postmarked June 15, 2015, was received by the Clerk on June 17, 2015, and was formally filed on June 18, 2015.

[2]The Court refers to the unnumbered page between pages 6 and 7 of the Petition as page 6a.

should also affirmatively notify petitioner that, if he does not amend the Petition to delete his unexhausted claims or otherwise notify the Court that he dismisses such unexhausted claims without prejudice, the concedely "mixed" Petition will be dismissed without prejudice.

II. PROCEDURAL HISTORY

On September 29, 2011, a San Bernardino County Superior Court ("Superior Court") jury convicted petitioner of first degree murder with personal use of a knife. (Petition at 2). On June 29, 2011, the trial court sentenced petitioner to 26 years to life in state prison. (Petition at 2). Petitioner appealed, and his appellate counsel asserted a single claim – Ground One herein. (Petition at 2, 5). On June 18, 2014, the Court of Appeal affirmed petitioner's conviction. See People v. Guzman, 2014 WL 2763651 (Cal. Ct. App. 2014) (No. E057027). On August 27, 2014, the California Supreme Court denied review. (Petition at 3). On an unknown date in May 2015, petitioner filed a habeas petition in the Superior Court, asserting Grounds Two through Six. (Petition at 3-4, 7, 8; Motion to Stay at 1). As noted above, petitioner constructively filed the instant Petition and Motion to Stay on June 11, 2015.

III. DISCUSSION

Petitioner requests that the Petition and this action be stayed pursuant to Pace v. DiGuglielmo, 544 U.S. 408 (2005) (citing Rhines v. Weber, 544 U.S. 269 (2005)) and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). As discussed below, the Court should conditionally grant a Kelly stay and deny a Rhines stay.

A. Rhines Analysis

Under Rhines, the court may stay and hold in abeyance a "mixed" habeas corpus petition containing both exhausted and unexhausted claims pending exhaustion of state remedies in only "limited circumstances." Rhines, 544 U.S. 269, 277 (2005). A petitioner seeking a Rhines stay must demonstrate (1) good cause for petitioner's failure to exhaust his claims first in state court; (2) the

unexhausted claims are not plainly meritless; and (3) he has not engaged in abusive litigation tactics or intentional delay. Rhines, 544 U.S. at 277-78.

Rhines does not define what constitutes good cause for failure to exhaust, but the Supreme Court has since recognized in dicta, that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' to excuse his failure to exhaust." Pace v. DiGuglielmo, 544 U.S. at 416 (citing Rhines, 544 U.S. at 278); see also Blake v. Baker, 745 F.3d 977, 980 (9th Cir. 2014) (referencing same, but noting that "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold." (quoting United States v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir.) (en banc), cert. denied, 531 U.S. 889 (2000) (internal quotation marks omitted))), cert. denied, 135 S. Ct. 128 (2014). The Ninth Circuit has provided some guidance on the matter. See Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005) (good cause does not require a showing of "extraordinary circumstances"); Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008) (petitioner did not establish good cause simply by alleging that he was "under the impression" that his claim was exhausted; mere "lack of knowledge" did not constitute good cause because "virtually every habeas petitioner could argue that he *thought* his counsel had raised unexhausted claim), cert. dismissed, 555 U.S. 1040 (2008) and cert. denied, 556 U.S. 1285 (2009); Blake, 745 F.3d at 981 (noting that Wooten held only that unspecific unsupported excuses for failing to exhaust – such as unjustified ignorance – did not satisfy the good cause requirement and that it did not hold that good cause inquiry involves considering how frequently a particular type of excuse viewed in the abstract, could be raised); Blake, 745 F.3d at 982 (good cause turns on whether petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify failure to exhaust; finding that district court abused its discretion in concluding that petitioner had failed to show good cause based on ineffective assistance of post-conviction counsel where petitioner

presented same as "concrete and reasonable excuse, supported by evidence"; holding that petitioner arguing ineffective assistance of counsel-based good cause not required to make any stronger showing of cause than that sufficient to excuse procedural default); King v. Ryan, 564 F.3d 1133, 1138 (9th Cir.) (district court did not abuse its discretion in finding that petitioner did not establish good cause when his factual allegations were "insufficiently detailed"), cert. denied, 58 U.S. 887 (2009).

This Court deems it unnecessary to determine whether petitioner's unexhausted claims are plainly meritless or whether petitioner has engaged in abusive litigation tactics or intentional delay because petitioner fails to show good cause for his failure to exhaust his unexhausted claims prior to filing this federal habeas action. Petitioner's Motion to Stay consists of a single paragraph in which he merely requests a stay pursuant to Pace and Kelly and prays that the Court permit him to exhaust Grounds Two through Six and to "amend them with habeas petition." This falls well short of demonstrating good cause. Accordingly, petitioner is not entitled to a Rhines stay of the currently "mixed" Petition.

B. Kelly Analysis

Under Kelly, a petitioner may invoke a three-step procedure: (1) a petitioner amends the "mixed" petition to delete the unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his petition to add the newly exhausted claims to the petition. However, use of this procedure to allow exhaustion of unexhausted claims or to permit amendment to add newly exhausted claims is not available if such claims are time-barred. King, 564 F.3d at 1135 ("A petitioner seeking to use the [foregoing] procedure will be able to amend his unexhausted claims back into his federal petition once he has exhausted them only if those claims are determined to be timely."). Here, as discussed below, the statute of limitations has not yet

expired and will expire no earlier than November 25, 2015. Accordingly, a Kelly stay is appropriate, so long as petitioner amends his "mixed" Petition to delete his unexhausted claims.

Pursuant to 28 U.S.C. § 2244(d)(1), a one-year statute of limitations exists for the filing of habeas petitions by persons in state custody. The limitation period runs from the latest of: (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review (28 U.S.C. § 2244(d)(1)(A)); (2) the date on which the impediment to filing an application 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 (28 U.S.C. § 2244(d)(1)(B)); (3) 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 applicable to cases on collateral review (28 U.S.C. § 2244(d)(1)(C)); or (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence (28 U.S.C. § 2244(d)(1)(D)).

In this case, the statute of limitations commenced to run no earlier than November 26, 2014 – the day after petitioner's conviction became final on November 25, 2014, *i.e.*, ninety (90) days after the California Supreme Court denied his petition for review on August 27, 2014, when petitioner's time to file a petition for certiorari with the United States Supreme Court expired. See Jimenez v. Quarterman, 555 U.S. 113, 119 (2009) ("direct review cannot conclude for purposes of § 2244(d)(1)(A) until the availability of direct appeal to the state courts, and to this Court, has been exhausted") (internal citations omitted); Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir.2009) (period of "direct review" after which state conviction becomes final for purposes of section 2244(d)(1)(A) includes the 90-day period for filing a petition for certiorari in the United States Supreme Court) (citing Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999)). Thus,

the statute of limitations will expire no earlier than November 25, 2015. Further, petitioner may be entitled to statutory tolling which could extend such deadline under Title 28 U.S.C. § 2244(d)(2).[3]

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[3]Title 28 U.S.C. § 2244(d)(2) provides that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one-year period. An untimely state habeas petition is not a "properly filed" petition for purposes of statutory tolling under section 2244(d)(2). Allen v. Siebert, 552 U.S. 3, 5-7 (2007); Pace v. DiGuglielmo, 544 U.S. at 412-13. A petition is timely in California if it is filed within a "reasonable time" after the petitioner learns of the grounds for relief. Carey v. Saffold ("Saffold"), 536 U.S. 214, 225 (2002). A California state petition filed after an unreasonable delay is not deemed "pending" for purposes of Section 2244(d)(2). Id. The statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case pending during that interval. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000), implicitly overruled in non-pertinent part by Saffold, 536 U.S. at 225-27. The statute is tolled where a petitioner is properly pursuing post-conviction relief. See Saffold, 536 U.S. at 219-20 (application "pending" as long as ordinary state collateral review process in continuance – *i.e.*, until completion of that process; application remains "pending" until it has achieved final resolution through state's post-conviction procedures); Harris v. Carter, 515 F.3d 1051, 1053 n.3 (9th Cir.) (statute of limitations tolled for all of time during which state prisoner attempting, through proper use of state court procedures, to exhaust state court remedies with regard to particular post-conviction application) (citation omitted), cert. denied, 555 U.S. 967 (2008). The Supreme Court has acknowledged that "California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition. And it determines the timeliness of each filing according to a 'reasonableness' standard." Saffold, 536 U.S. at 221. The typical progression involves a petition for writ of habeas corpus in the Superior Court. Biggs v. Duncan, 339 F.3d 1045, 1046 (9th Cir. 2003). "If it is denied, the petitioner will assert claims, most commonly the same ones, in a new petition in the California Court of Appeal. If the Court of Appeal denies the petition, he will assert claims in yet another new petition in, or petition for review by, the California Supreme Court." Id. Generally, applications for state post-conviction relief filed in this fashion will be deemed "pending," even during the intervals between the denial of a petition by one court and the filing of a new petition at the next level, unless there is undue delay. Biggs, 339 F.3d at 1046 (citing Saffold, 536 U.S. at 223-25); see also Nedds v. Calderon, 678 F.3d 777, 781 (9th Cir. 2012) (under Saffold, if state habeas court or federal habeas court determine that a petitioner's state habeas delays were unreasonable, he would not be entitled to statutory tolling for the intervals between state habeas petitions). An unjustified or unexplained gap between filings of six months is not reasonable, as such a period "is far longer than the 'short period[s] of time,' 30 to 60 days, that most States provide for filing an appeal to the state

(continued...)

In light of the foregoing, the Court should conditionally grant a Kelly stay so long as petitioner timely amends the Petition to delete his unexhausted claims or otherwise notifies the Court that he wishes to dismiss such unexhausted claims without prejudice. The Court should also caution petitioner that even if this action is stayed pending petitioner's exhaustion of the currently unexhausted claims, neither such stay, nor the pendency of the Petition (as amended to delete the unexhausted claims) will toll the statute of limitations as to the unexhausted claims, see Duncan v. Walker, 533 U.S. 167, 172 (2001), and that nothing in the Court's Order should be construed to suggest that the Court has made any determination as to whether it would ultimately permit petitioner to again amend the federal Petition to include Grounds Two through Six once exhausted or whether such claims would be timely if presented after November 25, 2015.

C. Dismissal of "Mixed Petition" Absent Amendment to Delete Unexhausted Claims

As noted above, petitioner concedes that the Petition contains exhausted as well as unexhausted claims and is therefore "mixed." A district court generally must dismiss "mixed" habeas corpus proceedings, that is, proceedings which raise both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982). However, a court may not dismiss a mixed petition without first permitting the petitioner the opportunity to amend the petition to delete the unexhausted claims. Jefferson v. Budge, 419 F.3d 1013, 1015 (9th Cir. 2005) (citations omitted). Accordingly, the Court should notify petitioner that if he does not timely amend the

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[3](...continued)
supreme court. . . . [and] the 10-day period that California gives a losing party to file a notice of appeal in the California Supreme Court. Evans v. Chavis, 546 U.S. 189, 201 (2006); see also Velasquez v. Kirkland, 639 F.3d 964, 967-68 (9th Cir.) (unexplained gaps of 81 and 91 days unreasonable), cert. denied, 132 S. Ct. 554 (2011); Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir. 2010) (unexplained gap of 146 days unreasonable), cert. denied, 131 S. Ct. 3023 (2011); Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam) (unexplained gaps of 115 and 101 days unreasonable).

Petition to delete his unexhausted claims or otherwise notify the Court that he wishes to dismiss the unexhausted claims without prejudice, the Petition will be dismissed as "mixed."

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order:

1. Approving and accepting this Report and Recommendation;

2. Denying the Motion to Stay to the extent it seeks a stay of the Petition in its current "mixed" form under Rhines;

3. Granting the Motion to Stay as described and limited below to the extent it seeks a stay of the Petition under Kelly to exhaust only Grounds Two through Six on the condition that, within fourteen (14) days of the District Judge's Order, petitioner amends the Petition to delete such unexhausted claims or otherwise notifies the Court that he wishes to dismiss such unexhausted claims without prejudice;

4. Cautioning petitioner that the failure to amend the Petition to delete unexhausted Grounds Two through Six or to otherwise notify the Court that he wishes to dismiss such unexhausted claims without prejudice within fourteen (14) days of the District Judge's Order will result in dismissal of the Petition as "mixed."

5. Cautioning petitioner that even if this action is stayed pending petitioner's exhaustion of the currently unexhausted claims, neither such stay, nor the pendency of the Petition (as amended to delete the unexhausted claims) will toll the statute of limitations as to the unexhausted claims, and that nothing in the Court's Order should be construed to suggest that the Court has made any determination as to whether it would ultimately permit petitioner to again amend the federal Petition to include Grounds Two through Six once exhausted, or whether such claims would be timely if presented after November 25, 2015.

6. Directing that petitioner file a report with the Court detailing the status of the state court proceedings beginning thirty (30) days from the date of the District Judge's Order and every sixty (60) days thereafter and advising petitioner, that even if he has no new information regarding the status of his efforts to exhaust his state remedies in a given period because a matter remains pending in state court, he must nonetheless file a status report advising the Court of that fact;

7. Directing that, within thirty (30) days of any state decision granting petitioner habeas relief or, if none, within thirty (30) days of the California Supreme Court's decision relative to a state habeas petition containing Grounds Two through Six, petitioner must file in this Court, a notice of such decision and attaching as an exhibit thereto, a copy of such decision;

8. Cautioning petitioner that the failure to meet any of the reporting requirements set out above in Paragraphs 6 and 7, shall result in an order vacating the Kelly stay, *nunc pro tunc*, may preclude consideration of the unexhausted claims, and may result in the dismissal of this action for lack of prosecution;

9. Finding that nothing in the District Judge's Order precludes respondent from raising procedural or other objections/defenses to the Petition or any claims contained therein; and

10. Directing the Clerk to remove this case from the Court's active case load.

DATED: July 2, 2015

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE