IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIAN SUM,

Petitioner, No. 2: 09 - cv - 2811 WBS TJB

vs.

KEN CLARK, Warden

Respondent. FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner is proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial, Petitioner was convicted of attempted murder, assault with a firearm, shooting at an inhabited dwelling, possession of a firearm by a felon, discharging a firearm with gross negligence as well as enhancements for using a firearm, discharging a firearm at an occupied motor vehicle and inflicting great bodily injury. Petitioner seeks relief on several grounds; specifically: (1) the trial court should have instructed the jury *sua sponte* that one may use lethal force to protect a third person who faces imminent death or great bodily injury ("Claim I"); (2) Petitioner could not be lawfully convicted for shooting a firearm in a grossly negligent manner because it is a lesser included offense of shooting a firearm at an occupied building ("Claim II"); and (3) the sentence for possession of a firearm by a felon should have been stayed

pursuant to Section 654 of the California Penal Code because the evidence was insufficient to establish multiple criminal intents ("Claim III"). After counsel was appointed, Petitioner filed a motion to stay and abey these proceedings so that he could exhaust a federal double jeopardy argument to the extent that Claim II was construed as including. For the following reasons, the motion to stay and abey should be denied.

II. FACTUAL BACKGROUND[1]

> At approximately 10:00 p.m. on May 12, 2005, police responded to a shooting near a house on Hickock Drive in Stockton. When they arrived, they found approximately 20 to 30 people standing in the street near a duplex across the street from the house. The victim, Than Lach, a resident of the duplex, lay on the sidewalk near his front door, bleeding from a gunshot wound to the leg. The front of the duplex, including both front doors and the garage, was damaged from being hit by bullets. A group of people attending a party stood in the front yard of the house in the proximity to where the shots had come.
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> Lach later told police he was inside his duplex when he heard a commotion outside. He rushed outside to look for one of his children. There was a large group of people, including the defendant across the street, some of them arguing with each other. Lach stood by his garage and watched as several people tried to push the defendant away from the fight. Defendant became upset and fired a handgun twice into the air. Just then, a red car drove up the street, turned in front of Lach's house and stopped. Seconds later, as defendant walked towards the car, Lach heard "six, seven, eight" gunshots. Lach turned to go back inside the duplex and was hit in the leg with a bullet. As he lay on the ground, he heard "three to four" more gunshots. [FN2] Lach was taken to the hospital where he told police defendant "was shooting at the red car as it was leaving."
> [FN2] Lach testified that all of the windows in the red car were rolled up, and there were no gunshots from the car.
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> Shirley Logan, Lach's neighbor and a resident of the other half of the duplex, told police she was watching television when she heard "two loud booms." She heard people talking and went outside to investigate. As Logan stood outside talking to her neighbors, a small red car drove slowly down the street and made a U-turn in front of the duplex. Logan heard at least six or seven gunshots and

[1] The factual background is taken from the California Court of Appeal, Third Appellate District opinion filed on March 26, 2008 and lodged as document four to Respondent's Answer which was filed in this Court on February 22, 2010 (hereinafter referred to as "Slip Op.").

saw muzzle flashes from across the street. [FN3] She turned and ran inside the duplex, continuing to hear gunfire as she entered her home to call 911.

[FN3] Logan testified that she did not see any muzzle flashes coming from the car.

Youn Seraypheap, a detective with the City of Stockton Police Department, was assigned to investigate the shooting. On May 24, 2005, Seraypheap and his partner, Detective Villanueva, interviewed defendant's mother, Toeur Mork, in front of her home. Mork first claimed she knew nothing about the shooting, telling detectives she left the party between 7:00 p.m. and 7:30 p.m. that evening with her husband and her youngest son because she had to be at work by 9:00 p.m. Mork said defendant was still at the party with his wife, Rinda Hoeurn, and their son when she left. Seraypheap and Villanueva next interviewed Hoeurn. Seraypheap told Hoeurn that defendant admitted to the shooting, and asked her to tell the truth about what happened. Hoeurn told them that, at some point during the party, "two or three carloads of Cambodian and Laotian people" from Modesto showed up and parked in the street. An argument later erupted between the group from Stockton and the group from Modesto. When the people from Modesto got back into their cars (one a red Acura Integra and another a Honda Accord) to leave, Hoeurn saw defendant shoot a handgun "two or three times" in the direction of the cars. Hoeurn ducked down and heard additional shots fired, which she believed came from the cars although she did not see any muzzle flashes. After the shooting, Hoeurn got into Mork's car with defendant and his family and went home.

When detectives finished questioning Hoeurn, they called Mork back outside. Seraypheap accused Mork of lying to them. Mork admitted she was inside the house watching television when she heard gunshots. She learned defendant was involved in the shooting and immediately left the party with her husband, her youngest son, defendant, Hoeurn, and her grandson. Mork told Seraypheap that, in the car on the way home, her husband yelled at defendant for shooting a gun.

Police canvassed the area and found six shell casings in the street between the house and the duplex. Four shotgun shells – two live rounds and two expended rounds – were also found in the driveway of the house where the party occurred.

(Slip Op at p. 2-5.)

III. PROCEDURAL HISTORY

Petitioner was arrested and charged with: assault with a firearm (Count I); shooting at an

inhabited dwelling (Count II); attempted murder of Lach (Count III); attempted murder of John Doe (the unknown driver of the red Acura) (Count IV); felon in possession of a firearm (Count V); and negligent discharge of a firearm (Count VI).

> At trial, Mork denied ever hearing gunshots or seeing anybody shoot a gun, and denied telling Seraypheap that her husband yelled at the defendant in the car on the way home for shooting a gun. Hoeurn testified that she and her family (including the defendant) left the party when a friend told her there was some kind of problem. Hoeurn also denied hearing or seeing anyone shooting at the party, and denied telling Seraypheap anything else about the shooting.
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> Near the end of the prosecution's case in chief, defense counsel requested, among other things, that the jury be instructed on self-defense based on Hoeurn's pretrial statements regarding possible shots fired from the red Acura. The court denied the request for lack of evidence. The defense rested without putting on any evidence.

(Slip Op. at p. 6.) The jury found Petitioner guilty of all counts except Count III in which the trial court declared a mistrial. Petitioner was sentenced to twenty-nine years eight months to life imprisonment. The trial court stayed sentence on Count VI (negligent discharge of a firearm) pursuant to California Penal Code § 654.[2]

Petitioner appealed to the California Court of Appeal, Third Appellate District. On March 26, 2008, the California Court of Appeal denied Petitioner's claims in a written opinion.[3] In his petition for review to the California Supreme Court, Petitioner made several arguments

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[2] California Penal Code § 654(a) states:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

[3] The California Court of Appeal determined that the firearm use enhancement with respect to Count II was expressly prohibited because the use of a weapon was a necessary element of shooting at an occupied dwelling. Thus, it struck the four-year sentence for that enhancement but affirmed the judgment in all other respects. (See Slip Op. at p. 11-12, 14.)

including the following, "[t]o the extent the failure to follow state procedures directly or indirectly impairs a liberty interest, namely the right not to suffer a dual conviction when one offense is necessarily included in the other, the error results in a denial of due process under the Fourteenth Amendment. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346.)" (Resp't's Lodged Doc. 5 at p. 13.) Thus, Petitioner's claim to the extent it contained a federal dimension was on a failure to follow state procedures.

The California Supreme Court denied the petition for review on June 11, 2008 without discussion or citation. Subsequently, Petitioner filed this federal habeas petition in this Court and Respondent filed an answer.

On October 1, 2010, this Court ordered Respondent to supplement his answer in the event that Claim II of the federal petition included a federal double jeopardy claim. On October 13, 2010, Respondent supplemented his answer in compliance with the October 1, 2010 order. Respondent made two arguments. First, Respondent argued that any double jeopardy claim is unexhausted. Second, Respondent argued that any double jeopardy claim can be denied on the merits.

On November 22, 2010, the undersigned construed Claim II as giving rise to a federal double jeopardy claim. This finding was made because federal courts have a duty to construe pro se habeas filings liberally. See Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006). Petitioner alleged the following in his federal habeas petition, "Appellant could not lawfully be convicted for shooting a firearm in a grossly negligent manner COUNT 6 because it is a lesser included offense of shooting a firearm at an occupied building." (Pet'r's Pet. at p. 6.) Thus, construing the petition liberally, the undersigned determined that Claim II could give rise to a Double Jeopardy claim because "[t]he Double Jeopardy Clause is implicated when a defendant has been convicted under the two different criminal statutes and both statutes prohibit the same offense or one offense is a lesser included offense of the others." United States v. Schales, 546 F.3d 965, 977 (9th Cir. 2008) (citations omitted); United States v. Davenport, 519 F.3d 940, 943 (9th Cir.

2008) ("When a defendant has violated two different criminal statutes, the double jeopardy provision is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other.") (citing Rutledge v. United States, 517 U.S. 292, 297 (1996)).

Nevertheless, it was determined that Petitioner failed to exhaust his federal double jeopardy claim. In the November 22, 2010 order, the undersigned stated that Petitioner's broad citation to the federal due process clause in the state filings was insufficient to exhaust a federal double jeopardy claim. As noted by the Ninth Circuit in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), amended by, 247 F.3d 904 (9th Cir. 2001):

> Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal claims in state court unless he specifically indicated to that court that those claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held that the petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of federal courts, even if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 (1982), or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds, see, e.g., Hiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999) . . . In Johnson, we explained that the petitioner must alert the state court to the fact that the relevant claim is a federal one without regard to how similar the state and federal standards for reviewing the claim may be or how obvious the violation of federal law is.

Petitioner's state filings failed to apprise the state courts of a possible federal double jeopardy argument as his claim as stated to the state courts related to "state procedures."

Even though the federal habeas petition was liberally construed as including a federal double jeopardy claim, the matter was unexhausted. A court can dismiss a claim on the merits even if it is unexhausted if it is determined that the claim is not "colorable." See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). However, in 2009, the California Supreme Court decided People v. Ramirez, 45 Cal. 4th 980, 990, 89 Cal. Rptr. 3d 586, 201 P.3d 466 (2009). In that case, the California Supreme Court held that discharging a firearm in a grossly negligent

manner was a necessarily included lesser offense of shooting at an inhabited dwelling. Thus, in light of Ramirez, it was determined that Petitioner at least had a "colorable" federal double jeopardy claim. Ultimately, counsel was appointed to represent Petitioner so that Petitioner could decide whether to file a motion to stay and abey these federal habeas proceedings pending exhaustion of his double jeopardy argument in the state courts, or move forward only on his exhausted arguments.

Subsequently, Petitioner filed a motion to stay and abey these proceedings pursuant to Rhines v. Weber, 544 U.S. 269 (2005). Respondent filed a response in opposition to the motion to stay and abey and Petitioner filed a reply brief.

IV. MOTION TO STAY AND ABEY

Petitioner seeks to stay and abey this federal habeas proceedings pursuant to Rhines, 544 U.S. 269 so that he can exhaust his argument within Claim II that his conviction for shooting a firearm in a grossly negligent manner violated the Double Jeopardy Clause as it is a lesser included offense of shooting a firearm at an occupied building. In Rhines, 544 U.S. at 277-78, the United States Supreme Court found that a stay and abeyance of a mixed federal habeas petition should be available only in the limited circumstance that good cause is shown for a failure to have first exhausted the claims in state court, that the claim or claims at issue potentially have merit and that there has been no indication that petitioner has been intentionally dilatory in pursuing the litigation.

"Good cause" under Rhines is not clearly defined. The Supreme Court has explained that in order to promote AEDPA's twin goals of encouraging the finality of state judgments and reducing delays in federal habeas review, "stay and abeyance should be available only in limited circumstances." Rhines, 544 U.S. at 277. The Ninth Circuit has explained that the Rhines good cause standard does not require a petitioner to show that "extraordinary circumstances" prohibited him from exhausting his claims. See Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). However, the Ninth Circuit has also held that a petitioner's mere "impression" that his

attorney had included a claim in an appellate brief did not constitute good cause for petitioner's failure to exhaust. See Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008). In Wooten, the Ninth Circuit explained that such a standard "would render stay-and-abey orders routine" and thus, "would run afoul of Rhines and its instruction that the district courts should only stay mixed petitions in 'limited circumstances.'" Id.

Petitioner makes two arguments in attempting to establish "good cause." First, Petitioner argues that appellate counsel's performance was defective in failing to inform the state courts of the double jeopardy argument as well as the fact that the California Supreme Court had already granted review and was awaiting further briefing from the parties in Ramirez, 45 Cal. 4th 980, 89 Cal. Rptr. 3d 586, 201 P.3d 466. Second, Petitioner argues that "good cause" is established because Petitioner was "untrained and knowledgeable about the law and about the requirements of federal habeas and exhaustion of state remedies." (Pet'r's Mot. Staty & Abey at p. 3.) Both of these arguments are unavailing.

Petitioner's ineffective assistance of counsel "good cause" argument must fail because if this was considered good cause, then all federal habeas petitioners raising ineffective assistance of appellate counsel would be entitled to a stay. See Wooten, 540 F.3d at 1024 (rejecting "good cause" argument because it would "render stay-and-abey orders routine" and thus contradict the Supreme Court's instruction "that district courts should only stay mixed petitions in limited circumstances.'"). Petitioner fails to explain why he could not exhaust his Double Jeopardy Claim in a state habeas petition before proceeding to federal court. See Meredith v. Lopez, Civ. No. 10-1395, 2011 WL 2621359, at *3 (E.D. Cal. June 30, 2011); Martin v. Neotti, Civ. No. 10-1279, 2010 WL 4570043, at *4 (C.D. Cal. Aug. 10, 2010), report and recommendation adopted by, 2010 WL 4570217 (C.D. Cal. Nov. 3, 2010); Givens v. McDonald, Civ. No. 09-3742, 2010 WL 144813, at *3 n. 1 (N.D. Cal. Jan. 11, 2010) ("Givens' assertion that Claims 1, 4 and 5 were not presented due to ineffective assistance of counsel does not alone show good cause for a stay. Among other things, he has not shown what counsel did that prevented him from raising those

claims in state court in the many months since his direct appeal concluded."). Furthermore, Petitioner's argument that he is ignorant of the law is also insufficient to satisfy the requisite Rhines "good cause" standard. See Orrostieta v. Virga, Civ. No. 10-478, 2010 WL 5676357, at *4 (C.D. Cal. Sept. 23, 2010) ("if the Court accepted Petitioner's argument as good cause, all habeas petitioners would be entitled to a stay simply by asserting their lack of education or ignorance of the law."), report and recommendation adopted by, 2011 WL 33484 (C.D. Cal. Jan. 28, 2011); Holloway v. Curry, Civ. No. 09-922, 2010 WL 2985078, at *3 (E.D. Cal. July 27, 2010) ("[C]ourts have held that neither a petitioner's reliance on appellate counsel or ignorance of the exhaustion requirement are sufficient to establish good cause under Rhines."), report and recommendation adopted by, 2010 WL 3703836 (E.D. Cal. Sept. 17, 2010); Hamilton v. Clark, Civ. No. 08-1008, 2010 WL 530111, at *2 (E.D. Cal. Feb. 9, 2010) (stating that ignorance of the law are common among prisoners and does not constitute good cause for failure to exhaust).

For the foregoing reasons, Petitioner failed to establish the requisite "good cause" under Rhines. Accordingly, the remaining Rhines factors need not be analyzed. As the motion to stay and abey should be denied, the double jeopardy argument, to the extent it was liberally construed within Claim II should be stricken and the merits of Petitioner's remaining claims should be considered. Because Respondent already answered the claims that should not be stricken (Dkt. No. 17.), no additional answer from Respondent as to Petitioner's claims should be deemed necessary at this stage of the proceedings.

V. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Petitioner's motion for stay and abeyance (Dkt. No. 32) be DENIED; and

2. Petitioner's double jeopardy argument as construed within Claim II be dismissed as unexhausted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days

after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 24, 2011

TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE