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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RAYMOND LEQUAN GIBBS,)
) Case No. CV 15-00949-AB (DFM)
) Petitioner,)
)) ORDER TO SHOW CAUSE
))
) v.)
))
W.L. MONTGOMERY,))
) Respondent.)
))
))

On February 10, 2015, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody. Dkt. 1 (“Petition”). Respondent has moved to dismiss the Petition on the basis that Petitioner has not exhausted his state-court remedies with respect to the cumulative-error claim presented in Ground Seven of the Petition. Dkt. 10.

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a petitioner has exhausted the remedies available in the state courts.¹ Exhaustion

¹ 28 U.S.C. § 2254(b)(1) provides that a habeas petition brought by a person in state custody “shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii)

1 requires that the prisoner’s contentions be fairly presented to the state courts
2 and be disposed of on the merits by the highest court of the state. See James v.
3 Borg, 24 F.3d 20, 24 (9th Cir. 1994). Moreover, a claim has not been fairly
4 presented unless the prisoner has described in the state court proceedings both
5 the operative facts and the federal legal theory on which his claim is based.
6 See Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Picard v. Connor, 404
7 U.S. 270, 275-78 (1971). As a matter of comity, a federal court will not
8 entertain a habeas corpus petition unless the petitioner has exhausted the
9 available state judicial remedies on every ground presented in the petition. See
10 Rose v. Lundy, 455 U.S. 509, 518-22 (1982). Petitioner has the burden of
11 demonstrating that he has exhausted available state remedies. See, e.g., Brown
12 v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

13 It appears that the claim of cumulative error in Ground Seven was not
14 presented in Petitioner’s petition for review to the California Supreme Court.
15 See Respondent’s Notice of Lodging, Lodged Document (“LD”) 2. Moreover,
16 although Petitioner joined the petitions filed by his co-defendants Wallace and
17 Khalill, neither of those petitions raised a claim of cumulative error. See LD 3,
18 4. Nor did Petitioner satisfy the exhaustion requirement by challenging each
19 error separately before the California Supreme Court. Although a claim may
20 be deemed fairly presented for exhaustion purposes where a petitioner asserted
21 a “sufficiently related” or “intertwined” claim in his state-court briefing—such
22 that, by raising one claim, the petition clearly implies another error—that
23 exception does not apply to cumulative-error claims. See Wooten v. Kirkland,
24 540 F.3d 1019, 1025 (9th Cir. 2008) (“Briefing a number of isolated errors that
25 turn out to be insufficient to warrant reversal does not automatically require
26 _____
27 circumstances exist that render such process ineffective to protect the rights of
28 the applicant.”)

1 the court to consider whether the cumulative effect of the alleged errors
2 prejudiced the petitioner.”).

3 If it were nonetheless clear here that Petitioner’s unexhausted claim was
4 procedurally barred under state law, then the exhaustion requirement would be
5 satisfied. See Castille v. Peoples, 489 U.S. 346, 351-52 (1989); Johnson v.
6 Zenon, 88 F.3d 828, 831 (9th Cir. 1996); Jennison v. Goldsmith, 940 F.2d
7 1308, 1312 (9th Cir. 1991). However, the Court concludes that it is not clear
8 that the California Supreme Court will hold that Petitioner’s unexhausted
9 claim is procedurally barred under state law if Petitioner were to raise it in a
10 habeas petition to the California Supreme Court, as such a proceeding is an
11 original proceeding is not subject to the same timeliness requirement as a
12 Petition for Review of a Court of Appeal decision. See, e.g., In re Harris, 5
13 Cal. 4th 813, 825 (1993) (granting habeas relief where petitioner claiming
14 sentencing error, even though the alleged sentencing error could have been
15 raised on direct appeal); People v. Sorensen, 111 Cal. App. 2d 404, 405 (1952)
16 (noting that claims that fundamental constitutional rights have been violated
17 may be raised by state habeas petition). The Court therefore concludes that this
18 is not an appropriate case for invocation of either statutory “exception” to the
19 requirement that a petitioner’s federal claims must first be fairly presented to
20 and disposed of on the merits by the state’s highest court. See 28 U.S.C. §
21 2254(b)(1)(B).

22 Accordingly, Petitioner’s inclusion of his cumulative error claim in
23 Ground Seven of his Petition renders the Petition a “mixed petition”
24 containing both exhausted and unexhausted claims. Under the total
25 exhaustion rule, if even one of the claims being alleged by a habeas petitioner
26 is unexhausted, the petition must be dismissed. See Rose, 455 U.S. at 522; see
27 also Coleman v. Thompson, 501 U.S. 722, 731 (1991); Castille, 489 U.S. at
28 349. However, in Rhines v. Weber, 544 U.S. 269, 277 (2005), the Supreme

1 Court held that, in certain “limited circumstances,” a district court may stay a
2 mixed petition and hold it in abeyance while the petitioner returns to state
3 court to exhaust his unexhausted claims. Under Rhines, the prerequisites for
4 obtaining a stay while the petitioner exhausts his state remedies are: (1) that
5 the petitioner show good cause for his failure to exhaust his claims first in state
6 court; (2) that the unexhausted claims not be “plainly meritless”; and (3) that
7 petitioner not have engaged in “abusive litigation tactics or intentional delay.”
8 See id. at 277-78.

9 Here, Petitioner has not even requested that the Court hold the Petition
10 in abeyance until after he exhausts his state remedies with respect to his
11 unexhausted claim, let alone purported to make the three necessary showings
12 under Rhines. Per Rhines, where the petitioner has presented the Court with a
13 mixed petition and the Court determines that stay and abeyance is
14 inappropriate, the Court must “allow the petitioner to delete the unexhausted
15 claims and to proceed with the exhausted claims if dismissal of the entire
16 petition would unreasonably impair the petitioner’s right to obtain federal
17 relief.” See Rhines, 544 U.S. at 278; see also Henderson v. Johnson, 710 F.3d
18 872, 873 (9th Cir. 2013).

19 IT THEREFORE IS ORDERED that, on or before May 7, 2015,
20 Petitioner either (a) file a stay-and-abeyance motion if he believes he can make
21 the requisite three showings under Rhines; (b) file a Notice of Withdrawal of
22 Ground Seven; or (c) show cause in writing, if he has any, why this action
23 should not be dismissed without prejudice for failure to exhaust state remedies
24 unless Petitioner withdraws his unexhausted claim.

25 Dated: April 9, 2015



26 DOUGLAS F. McCORMICK
27 United States Magistrate Judge
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