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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFONSO PENAFLOR,)	Case No. EDCV 15-1339-DSF (JPR)
)	
Petitioner,)	
)	ORDER TO SHOW CAUSE
vs.)	
)	
STU SHERMAN, Warden,)	
)	
Respondent.)	
)	

On June 26, 2015, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody, challenging his convictions and 24-year-plus sentence for robbery and possession of a firearm by a felon. (Pet. at 2.) The Petition raises four claims: (1) the trial court violated due process when it denied Petitioner’s motion to dismiss a prior strike conviction, (2) “[a] mistrial should have been declared” because his “presumption of innocence was jeopardized” when the jury saw him in shackles, (3) the prosecution lost critical cell-phone evidence, and (4) his trial counsel was constitutionally ineffective. (Id. at 6, 8, 9, 11.) Although he appears to have raised ground one on direct appeal, he acknowledges that he has

1 not previously presented grounds two, three, or four to the state
2 courts. (Id. at 6-13.)

3 Under 28 U.S.C. § 2254(b), habeas relief may not be granted
4 unless a petitioner has exhausted the remedies available in state
5 court.¹ Exhaustion requires that the petitioner's contentions
6 were fairly presented to the state courts, Ybarra v. McDaniel,
7 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits
8 by the highest court of the state, Greene v. Lambert, 288 F.3d
9 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal
10 court will not entertain a habeas petition unless the petitioner
11 has exhausted the available state judicial remedies on every
12 ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518
13 (1982). A federal court may raise the failure-to-exhaust issue
14 sua sponte and summarily dismiss on that ground. See Granberry
15 v. Greer, 481 U.S. 129, 134-35 (1987); Stone v. City & Cnty. of
16 S.F., 968 F.2d 850, 856 (9th Cir. 1992) (dictum).

17 Petitioner acknowledges that grounds two, three, and four
18 have never been presented to the California Supreme Court (see
19 Pet. at 13 (stating that the claims were not previously raised
20 because his state-appointed appellate counsel "against my request
21 did not file these grounds")); in contrast, it appears that
22 ground one has been exhausted, in a Petition for Review to the
23 state supreme court (id. at 7). Grounds two, three, and four
24

25 ¹ A habeas petition "shall not be granted unless it appears
26 that - (A) the applicant has exhausted the remedies available in
27 the courts of the State; or (B)(i) there is an absence of available
28 State corrective process; or (ii) circumstances exist that render
such process ineffective to protect the rights of the applicant."
28 U.S.C. § 2254(b)(1).

1 therefore are unexhausted, and his inclusion of them renders the
2 Petition "mixed," containing both exhausted and unexhausted
3 claims. Such petitions must generally be dismissed. See Rose,
4 455 U.S. at 522.

5 In certain "limited circumstances," a district court may
6 stay a mixed petition and hold it in abeyance while the
7 petitioner returns to state court to exhaust any unexhausted
8 claims. See Rhines v. Weber, 544 U.S. 269, 277 (2005). Under
9 Rhines, the prerequisites for obtaining a stay while the
10 petitioner exhausts his state remedies are as follows: (1) the
11 petitioner must show good cause for his failure to earlier
12 exhaust the claims in state court, (2) the unexhausted claims
13 must not be "plainly meritless," and (3) the petitioner must not
14 have engaged in "abusive litigation tactics or intentional
15 delay." Id. at 277-78. Although Petitioner needs the Court's
16 approval for a stay of the federal proceedings, nothing prevents
17 him from immediately raising the claims in state court, stay or
18 no stay.

19 Petitioner acknowledges that grounds two, three, and four
20 are unexhausted but asserts that his good cause for not earlier
21 exhausting them is that his appointed counsel disregarded his
22 requests to raise the claims on appeal. (Pet. at 8, 10, 11, 13.)
23 That does not explain, however, why Petitioner did not raise them
24 himself in a state habeas petition, although he appears to have
25 been unaware of the availability of that form of relief. (See
26 Pet. at 7 (stating in response to question concerning state
27 collateral proceedings, "I was not aware of any other motion to
28 file for remedie [sic].") Thus, it is unclear from the face of

1 the Petition whether Petitioner can meet the Rhines requirements.

2 IT THEREFORE IS ORDERED that within 21 days of the date of
3 this Order, Petitioner do one of the following: (1) file a formal
4 stay-and-abey motion if he believes he can make the required
5 showings under Rhines; (2) voluntarily dismiss the Petition
6 without prejudice under Federal Rule of Civil Procedure 41(a)(1),
7 with the understanding that any later petition may be time barred
8 under § 2244(d)(1); (3) voluntarily dismiss grounds two, three,
9 and four of the Petition and elect either to proceed on the
10 exhausted claim, ground one, or seek a stay of the then fully
11 exhausted Petition under Kelly v. Small, 315 F.3d 1063 (9th Cir.
12 2003) (as amended) (allowing for stays of fully exhausted federal
13 petitions without showing of good cause), overruling on other
14 grounds recognized by Robbins v. Carey, 481 F.3d 1143, 1149 (9th
15 Cir. 2007), with the understanding that he will be allowed to
16 amend any newly exhausted claims back into the Petition only if
17 the claims are timely or "relate back" to the original claim, see
18 Mayle v. Felix, 545 U.S. 644, 664 (2005); or (4) show cause in
19 writing why this action should not be dismissed without prejudice
20 for failure to exhaust state remedies.

21 Plaintiff is expressly warned that his failure to timely
22 comply with this Order may result in the Petition being dismissed
23 for the reasons stated above and for failure to prosecute.

24
25 DATED: July 16, 2015



JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE