

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RAMON PEREZ ZAPATA,
Petitioner,
v.
S. FRAUENHEIM,
Respondent.

Case No. 1:16-cv-01260-SAB-HC
ORDER TO SHOW CAUSE
ORDER DENYING MOTION FOR
APPOINTMENT OF COUNSEL
(ECF No. 3)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner challenges his 2013 convictions sustained in the Madera County Superior Court for multiple sex offenses. Petitioner was sentenced to an imprisonment term of thirty-nine years to life. Petitioner alleges that: (1) the trial court failed to undertake the requisite Marsden inquiry; (2) the trial court erroneously restricted cross-examination; and (3) Petitioner was convicted on the basis of an unlawful confession.

I.
DISCUSSION

A. Exhaustion

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered

1 to file a response, if it “plainly appears from the petition and any attached exhibits that the
2 petitioner is not entitled to relief in the district court.” A petitioner in state custody who is
3 proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28
4 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the
5 state court the initial opportunity to correct the state’s alleged constitutional deprivations.
6 Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A
7 petitioner can satisfy the exhaustion requirement by providing the highest state court with a full
8 and fair opportunity to consider each claim before presenting it to the federal court. O’Sullivan v.
9 Boerckel, 526 U.S. 838, 845 (1999); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v.
10 Connor, 404 U.S. 270, 276 (1971).

11 If Petitioner has not sought relief in the California Supreme Court, the Court cannot
12 proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). The Court must dismiss without
13 prejudice a “mixed” petition containing both exhausted and unexhausted claims to give a
14 petitioner an opportunity to exhaust the claims if he can do so. See Lundy, 455 U.S. at 522.
15 However, a petitioner may, at his option, withdraw the unexhausted claims and go forward with
16 the exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict
17 courts must provide habeas litigants with the opportunity to amend their mixed petitions by
18 striking unexhausted claims as an alternative to suffering dismissal.”). A petitioner may also
19 move to withdraw the entire petition and return to federal court when he has finally exhausted his
20 state court remedies.¹ A petitioner may also move to stay and hold in abeyance the petition while
21 he exhausts his claims in state court. See Rhines v. Weber, 544 U.S. 269, 277 (2005); Kelly v.
22 Small, 315 F.3d 1063, 1070–71 (9th Cir. 2002).

23 In the instant petition, Petitioner acknowledges that he raises some claims that are
24 unexhausted. (ECF No. 1 at 5). Upon review of the petition and the attachments, it appears
25 claims 2 and 3 are unexhausted.

26 ///

27 ¹ Although the limitations period tolls while a properly filed request for collateral review is pending in state court,
28 28 U.S.C. § 2244(d)(2), it does not toll for the time a federal habeas petition is pending in federal court. Duncan v.
Walker, 533 U.S. 167, 181–82 (2001).

1 Petitioner is forewarned that failure to follow this order may result in dismissal of the
2 petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner's failure to prosecute or
3 to comply with a court order may result in a dismissal of the action).

4
5 IT IS SO ORDERED.

6 Dated: September 7, 2016


UNITED STATES MAGISTRATE JUDGE

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28