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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SEAN ROWELL,

Petitioner,

Civ. No. S-09-776 KJM P

vs.

KEN CLARK,

Respondents.

ORDER

_____/

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his Amador County conviction on arson, using a destructive device to destroy property and the finding that he used a device designed to accelerate a fire. He has also submitted an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must

1 be waived explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion,
2 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
3 providing the highest state court with a full and fair opportunity to consider all claims before
4 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
5 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

6 The state court has had an opportunity to rule on the merits when the petitioner
7 has fairly presented the claim to that court. The fair presentation requirement is met where the
8 petitioner has described the operative facts and legal theory on which his claim is based. Picard,
9 404 U.S. at 277 - 78. Generally, it is “not enough that all the facts necessary to support the
10 federal claim were before the state courts . . . or that a somewhat similar state-law claim was
11 made.” Anderson v. Harless, 459 U.S. 4, 6 (1982). Instead,

12 [i]f state courts are to be given the opportunity to correct alleged
13 violations of prisoners' federal rights, they must surely be alerted
14 to the fact that the prisoners are asserting claims under the United
15 States Constitution. If a habeas petitioner wishes to claim that an
evidentiary ruling at a state court trial denied him the due process
of law guaranteed by the Fourteenth Amendment, he must say so,
not only in federal court, but in state court.

16 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus
17 must include reference to a specific federal constitutional guarantee, as well as a statement of the
18 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 116 S. Ct. 2074,
19 2081 (1996). The United States Supreme Court has held that a federal district court may not
20 entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with
21 respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982). A mixed petition
22 containing both exhausted and unexhausted claims must be dismissed.

23 Petitioner raises four claims in his petition: the court erred in denying his motion
24 to substitute counsel, based on counsel's conflict of interest; the court erred in failing to instruct

25
26 ¹ A petition may be denied on the merits without exhaustion of state court remedies. 28
U.S.C. § 2254(b)(2).

1 the jurors to view certain witnesses' testimony with distrust; the court erred in instructing the
2 jury it could disregard the fact that the codefendant received a reduced sentence in exchange for
3 his testimony; and the prosecutor committed misconduct in his closing argument.

4 After reviewing the record in this action, the court finds that petitioner has failed
5 to exhaust state court remedies as to his first claim. Accordingly, the petition is a mixed petition
6 containing both exhausted and unexhausted claims and must be dismissed. Good cause
7 appearing, petitioner will be granted thirty days to file an amended petition raising only
8 exhausted claims.²

9 In accordance with the above, IT IS HEREBY ORDERED that:

- 10 1. Petitioner's request to proceed in forma pauperis is granted;
- 11 2. Petitioner's petition for a writ of habeas corpus is dismissed; and
- 12 3. Petitioner is granted thirty days from the date of this order to file an amended
13 petition raising only exhausted claims. Failure to comply with this order will result in a
14 recommendation that this action be dismissed without prejudice.

15 DATED: August 26, 2009.

16 
17 U.S. MAGISTRATE JUDGE

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22 ² Petitioner is cautioned that if he chooses to proceed on an amended petition raising
23 only exhausted claims he will risk forfeiting consideration of the unexhausted claims in this or
24 any other federal court. See McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455 U.S. at
25 520-21; Rule 9(b), Rules Governing Section 2254 Cases.

26 Petitioner is further cautioned that the habeas corpus statute imposes a one year statute
of limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the
one year period will start to run on the date on which the state court judgment became final by
the conclusion of direct review or the expiration of time for seeking direct review, although the
statute of limitations is tolled while a properly filed application for state post-conviction or other
collateral review is pending. 28 U.S.C. § 2244(d).