IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN CONCEPCION,

Petitioner,

vs.

ED BARNES,

Respondent.

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No. CIV S-11-0664-GEB-CMK-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is Respondent's motion to dismiss the petition on the grounds that it is unexhausted (Doc. 19).

I. MOTION TO DISMISS

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th

Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

Here, respondent argues that the claims raised in petitioner's federal habeas petition are unexhausted as petitioner failed to specifically raise the claims presented here in his petition for review filed with the California Supreme Court. Petitioner argues dismissal of his petition would be unjust and bring undue hardship upon him for relying on his appellate attorney.

Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required before the federal court can grant a claim presented in a habeas corpus case. See Rose v. Lundy, 455 U.S. 509 (1982); see also Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003); Hunt v. Pliler, 336 F.3d 839 (9th Cir. 2003). "A petitioner may satisfy the exhaustion requirement in two ways: (1) by providing the highest state court with an opportunity to rule on the merits of the claim . . .; or (2) by showing that at the time the petitioner filed the habeas petition in federal court no state remedies are available to the petitioner and the petitioner has not deliberately by-passed the state remedies." Batchelor v. Cupp , 693 F.2d 859, 862 (9th Cir. 1982) (citations omitted). The exhaustion doctrine is based on a policy of federal and state comity, designed to give state courts the initial opportunity to correct alleged constitutional deprivations. See Picard v. Connor, 404 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518.

Regardless of whether the claim was raised on direct appeal or in a post-conviction proceeding, the exhaustion doctrine requires that each claim be fairly presented to the state's highest court. See Castille v. Peoples, 489 U.S. 346 (1989). Although the exhaustion doctrine requires only the presentation of each federal claim to the highest state court, the claims

must be presented in a posture that is acceptable under state procedural rules. See Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is denied by the state courts on procedural grounds, where other state remedies are still available, does not exhaust the petitioner's state remedies. See Pitchess v. Davis, 421 U.S. 482, 488 (1979); Sweet, 640 F.2d at 237-89.[1]

In addition to presenting the claim to the state court in a procedurally acceptable manner, exhaustion requires that the petitioner make the federal basis of the claim explicit to the state court by including reference to a specific federal constitutional guarantee. See Gray v. Netherland, 518 U.S. 152, 162-63 (1996); see also Shumway v. Payne, 223 F.3d 982, 998 (9th Cir. 2000). It is not sufficient for the petitioner to argue that the federal nature of the claim is self-evident. See Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d 904 (9th Cir. 2001).

In the instant case, respondent argues none of petitioner's claims raised in the current petition were specifically raised in the California Supreme Court, leaving them unexhausted. Respondent contends that petitioner did not file any petition for writ of habeas corpus in the California Supreme Court, only a petition for review on direct appeal. The petition for review filed with the California Supreme Court consisted only of petitioner's appellate attorney's Wende brief, referring to a brief filed pursuant to People v. Wende, 158 Cal. Rptr. 839 (Cal. 1979), and the California Court of Appeal's unpublished opinion. There were no specific claims raised in that petition for review, rather the petition contained only the following statement: "I am the appelant [sic] accompanying brief. I'm request a petition for review with the California Supreme Court." (Lodged Doc. 6).

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[1] This situation of procedural deficiency is distinguishable from a case presented to the state court using proper procedures but where relief on the merits is precluded for some procedural reason, such as untimeliness or failure to raise the claim on direct appeal. The former represents an exhaustion problem; the latter represents a procedural default problem.

In his current petition, petitioner raises four claims: (1) ineffective assistance of counsel; (2) excessive sentence; (3) involuntary plea to special allegation; and (4) application of special allegation excessive. These claims were not raised in petitioner's petition for review filed with the California Supreme Court. Rather, the only challenge to his conviction filed in the California Supreme Court was the Wende brief his appellate attorney filed. The filing of such a brief by definition does not contain any specific claim; it is a request that the court review the record independently for any possible error. Petitioner did file a pro-se supplemental brief with the California Court of Appeal raising specific claims of error, which was filed along with the Wende brief. However, pursuant to the information before the court, these claims were not raised in his brief filed with the California Supreme Court.

Petitioner does not challenge respondent's arguments that he failed to raise his specific claims before the California Supreme Court. Plaintiff does not contend that his pro se brief, which he filed with the California Court of Appeal, was filed with the California Supreme Court in order to exhaust his claims. Rather, he argues that dismissal of his petition would be unjust as he followed the advise of his attorney, who failed to inform him of what was required. The failure of petitioner's appellate attorney to properly advise petitioner does not render his federal habeas petition exhausted. If petitioner believes his attorney failed to provide him effective assistance of counsel, that is a claim which may be raised in a habeas petition. However, prior to filing such a petition with this court, petitioner is required to exhaust such claims in the California Supreme Court. Until such claims are exhausted, this court is without authority to review and grant a claim presented in a habeas corpus case.

II. CONCLUSION

Based on the foregoing, the undersigned recommends that respondent's motion to dismiss (Doc. 19) be granted.

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 14 days

after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 7, 2012

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE