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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARCELLO GARCIA,

Petitioner,

v.

GARY SANDOR, warden,

Respondent.

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No. C 09-5369 SI (pr)

**ORDER DISMISSING  
UNEXHAUSTED CLAIM AND  
SETTING BRIEFING SCHEDULE**

Marcello Garcia filed this pro se action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted on the five claims alleged. Respondent moved to dismiss on the ground that state court remedies had not been exhausted for one of the claims. The court granted the motion, finding that state court remedies were not exhausted for one of the claims and ordering petitioner to choose how to deal with this problem. See Order For Petitioner To Make Election Regarding Unexhausted Claim, p. 5. Petitioner thereafter filed a "request to dismiss unexhausted claim and amend to add claim" in which he elected to dismiss his unexhausted claim 2 – i.e., that the jury was misinstructed on the fear element of forcible sodomy – and wanted to amend to add a claim that there was insufficient evidence to support the "findings that the offenses were committed by force or duress," Docket # 7, p. 1. Although he provided no argument in support of his newly added claim, he states that the claim was presented in his petition for review in the California Supreme Court.

Upon due consideration, petitioner's request to dismiss unexhausted claim and amend to add claim is GRANTED. (Docket # 7.) Petitioner's claim 2 – i.e., that the jury was

1 misinstructed on the fear element of forcible sodomy – is dismissed. The remaining claims in  
2 the petition, as well as the newly added claim of insufficient evidence, warrant a response from  
3 respondent. The court now sets the following briefing schedule:


4 1. Respondent must file and serve, on or before **November 4, 2011**, an answer  
5 conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause  
6 why a writ of habeas corpus should not be issued. Respondent must file with the answer a copy  
7 of all portions of the court proceedings that have been previously transcribed and that are  
8 relevant to a determination of the issues presented by the petition.

9 2. If petitioner wishes to respond to the answer, he must do so by filing a traverse  
10 with the court and serving it on respondent on or before **December 9, 2011**.

11 3. If respondent wishes to assert a procedural challenge to the amendment that adds  
12 the insufficient evidence claim, he may file and serve a motion on or before **November 4, 2011**.  
13 If respondent files such a motion, petitioner must file and serve his opposition to the motion on  
14 or before **December 9, 2011**. Respondent must file and serve any reply brief on or before  
15 **December 23, 2011**.

16 IT IS SO ORDERED.

17 DATED: October 3, 2011

  
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SUSAN ILLSTON  
United States District Judge

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