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United States District Court
For the Northern District of California

E-Filed 11/29/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JACOB NAVARRO,
Petitioner,

No. C 10-2890 RS (PR)

ORDER OF DISMISSAL

v.

JOHN WAYNE HAVILAND,
Respondent.

INTRODUCTION

Petitioner, a state prisoner proceeding *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss the petition on grounds that the claims are unexhausted. For the reasons stated herein, respondent's motion is GRANTED, and the petition DISMISSED.

DISCUSSION

As grounds for federal habeas relief, petitioner alleges in his federal petition that trial counsel rendered ineffective assistance by failing to (1) develop the issue of petitioner's intoxication at trial, (2) independently evaluate the charges against petitioner; and (3) investigate petitioner's mental condition. Petitioner also alleges that appellate counsel

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1 rendered ineffective assistance by failing to raise on appeal these issues regarding trial
2 counsel's alleged trial errors. In his petition to the state supreme court, the only ineffective
3 assistance issue petitioner presented was that trial counsel failed to request a jury instruction
4 on a lesser included offense. (Mot. to Dismiss ("MTD"), Exs. 2 & 3 at 31.)

5 Prisoners in state custody who wish to challenge collaterally in federal habeas
6 proceedings either the fact or length of their confinement are first required to exhaust
7 state judicial remedies, either on direct appeal or through collateral proceedings, by
8 presenting the highest state court available with a fair opportunity to rule on the merits
9 of each and every claim they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c);
10 *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982). The state's highest court must be given an
11 opportunity to rule on the claims even if review is discretionary. *See O'Sullivan v. Boerckel*,
12 526 U.S. 838, 845 (1999) (petitioner must invoke "one complete round of the State's
13 established appellate review process."). Even though non-exhaustion is an affirmative
14 defense, the petitioner bears the burden of proof that state judicial remedies were properly
15 exhausted. *Parker v. Kelchner*, 429 F.3d 58, 62 (3d Cir. 2005). If available state remedies
16 have not been exhausted as to all claims, the district court must dismiss the petition. *See*
17 *Rose*, 455 U.S. at 510.

18 Respondent contends that the instant petition is unexhausted because petitioner never
19 presented his claims to the California Supreme Court for decision. (MTD at 2.) Having
20 reviewed the papers and documents submitted by the parties, this Court concludes that
21 petitioner has not established that he fairly presented his claims to the California Supreme
22 Court for decision. Specifically, petitioner did not present any of the claims raised in the
23 instant petition in his petition to the state supreme court, but raised there an issue of
24 ineffective assistance not raised here. Accordingly, respondent's motion to dismiss on
25 grounds that the claim are not exhausted (Docket No. 6) is GRANTED. *See Rose*, 455 U.S.
26 at 510. As the petition contains only unexhausted claims, petitioner's motion to stay the
27 petition (Docket No. 7) is DENIED. *Id.* The petition is hereby DISMISSED. The Clerk
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1 shall enter judgment in favor of respondent, terminate the pending motions, and close the
2 file. This order terminates Docket Nos. 6 & 7.

3 **IT IS SO ORDERED.**

4 DATED: November 24, 2010


RICHARD SEEBORG
United States District Judge

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