

United States District Court
For the Northern District of California

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

ROBERT ROY GARCIA,

 Petitioner,

 v.

GARY SWARTHOUT, Warden,

 Respondent.

No. C-11-1188 TEH (PR)

ORDER OF DISMISSAL WITH LEAVE
TO AMEND; REQUIRING NOTICE OF
ELECTION; GRANTING LEAVE TO
PROCEED IN FORMA PAUPERIS

(Doc. #2)

_____ /

 Petitioner, a state prisoner incarcerated at California
State Prison-Solano in Vacaville, California, has filed a pro se
Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254
challenging a judgment of conviction from Sonoma County superior
court. Doc. #1. He also seeks leave to proceed in forma pauperis,
Doc. #2, which the Court now GRANTS. For the reasons set forth
below, the Petition will be DISMISSED WITH LEAVE TO AMEND.

I

 According to the Petition, Petitioner was sentenced to
eight years and four months in state prison following his

1 convictions of two counts of assault with a deadly weapon and other
2 crimes. Doc. #1 at 2-3. Petitioner sought post-conviction relief
3 in the state superior and appellate courts until the California
4 Supreme Court denied his final petition on August 11, 2010. Doc. #1
5 at 44. The instant federal Petition for a Writ of Habeas Corpus
6 followed.

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8 II

9 A

10 This Court may entertain a petition for a writ of habeas
11 corpus "in behalf of a person in custody pursuant to the judgment of
12 a State court only on the ground that he is in custody in violation
13 of the Constitution or laws or treaties of the United States." 28
14 U.S.C. § 2254(a). It shall "award the writ or issue an order
15 directing the respondent to show cause why the writ should not be
16 granted, unless it appears from the application that the applicant
17 or person detained is not entitled thereto." Id. § 2243.

18 Petitioner seeks federal habeas corpus relief by alleging
19 that: (1) trial counsel was ineffective during the trial and
20 sentencing proceedings; (2) there was insufficient evidence to
21 support Petitioner's convictions; (3) the prosecutor committed
22 misconduct and engaged in selective prosecution; (4) Petitioner was
23 denied his right to present a defense; (5) Petitioner was denied his
24 right to proper notice of the charged strike allegation; and (6) the
25 trial court was biased against Petitioner by failing to instruct the
26 jury on certain lesser included offenses.

27 Liberally construed, Petitioner's claims appear cognizable
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1 under 28 U.S.C. § 2254 and ordinarily would merit an Answer from
2 Respondent. See Zichko v. Idaho, 247 F.3d 1015, 1020 (9th Cir.
3 2001) (federal courts must construe pro se petitions for writs of
4 habeas corpus liberally). It appears, however, that Petitioner has
5 included an unexhausted claim in his Petition, namely ineffective
6 assistance of appellate counsel. See Doc. #1 at 6. The inclusion
7 of an unexhausted claim with exhausted claims renders the Petition a
8 "mixed" petition, which is subject to dismissal with leave to amend.
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10 B

11 Prisoners in state custody who wish to challenge
12 collaterally in federal habeas proceedings either the fact or length
13 of their confinement must first exhaust state judicial remedies,
14 either on direct appeal or through collateral proceedings, by
15 presenting the highest state court available with a fair opportunity
16 to rule on the merits of each and every claim they seek to raise in
17 federal court. See 28 U.S.C. § 2254(b) & ©. The
18 exhaustion-of-state-remedies doctrine reflects a policy of
19 federal-state comity to give the state "the initial "opportunity to
20 pass upon and correct" alleged violations of its prisoners' federal
21 rights.'" Picard v. Connor, 404 U.S. 270, 275 (1971) (citations
22 omitted). The exhaustion requirement is satisfied only if the
23 federal claim has been "fairly presented" to the state courts. See
24 id.; Peterson v. Lampert, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en
25 banc). A federal district court must dismiss a federal habeas
26 petition containing any claim as to which state remedies have not
27 been exhausted. See Rhines v. Webber, 544 U.S. 269, 273 (2005).
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C

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2 Due to a critical one-year statute of limitations on the
3 filing of federal habeas petitions under the Antiterrorism and
4 Effective Death Penalty Act of 1996 ("AEDPA"), see 28 U.S.C. §
5 2244(d), the Court is reluctant to dismiss the mixed petition (and
6 possibly cause a later-filed petition to be time-barred) without
7 giving Petitioner the opportunity to elect whether to proceed with
8 just his exhausted claims, or to try to exhaust the unexhausted
9 claim before having this Court consider all claims. Accordingly,
10 instead of an outright dismissal of the action, the Court will allow
11 Petitioner to choose whether he wants to:

12 (1) dismiss the unexhausted claim and go forward in this
13 action with only the exhausted claims; or

14 (2) dismiss this action and return to state court to
15 exhaust all claims before filing a new federal petition presenting
16 all of his claims; or

17 (3) move to stay these proceedings while he exhausts his
18 unexhausted claims in the California Supreme Court.

19 In Rhines, the United States Supreme Court discussed the
20 stay-and-abeyance procedure for mixed petitions. The Court
21 cautioned district courts against being too liberal in allowing a
22 stay because a stay works against several of the purposes of AEDPA
23 in that it "frustrates AEDPA's objective of encouraging finality by
24 allowing a petitioner to delay the resolution of the federal
25 proceeding" and "undermines AEDPA's goal of streamlining federal
26 habeas proceedings by decreasing a petitioner's incentive to exhaust
27 all his claims in state court prior to filing his federal petition."
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1 Rhines, 544 U.S. at 277. A stay and abeyance "is only appropriate
2 when the district court determines there was good cause for the
3 petitioner's failure to exhaust his claims first in state court,"
4 the claims are not meritless, and there are no intentionally
5 dilatory litigation tactics by the petitioner. Id. at 277-78. Any
6 stay must be limited in time to avoid indefinite delay. Id.
7 Reasonable time limits would be thirty (30) days to proceed to state
8 court and thirty (30) days to return to federal court after the
9 final rejection of the claims by the state court. See id. at 278;
10 Kelly v. Small, 315 F.3d 1063, 1071 (9th Cir. 2003).

11 Petitioner is cautioned that each of the three options
12 outlined above has risks and drawbacks that he should take into
13 account in deciding which one to choose. If he chooses option (1)
14 and goes forward with only his exhausted claims, he may face
15 dismissal of any later-filed petition. See 28 U.S.C. § 2244(b). If
16 he chooses option (2), dismissing this action and returning to state
17 court to exhaust all claims before filing a new federal petition,
18 his new federal petition may be rejected as time-barred. See 28
19 U.S.C. § 2244(d). If he chooses option (3), he must file a motion
20 in this Court to obtain a stay and demonstrate good cause for
21 failing to exhaust, and, if the motion is granted, he then must act
22 diligently to file a petition in the California Supreme Court and
23 obtain a decision from that court on his unexhausted claim, and then
24 must return to this Court. And under option (3), this action
25 stalls; this Court will do nothing further to resolve the case while
26 Petitioner is diligently seeking relief in state court.

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1 III

2 For the foregoing reasons and for good cause shown,

3 1. Petitioner's request to proceed in forma pauperis
4 (Doc. #2) is GRANTED.

5 2. Within thirty (30) days of the date of this Order,
6 Petitioner must serve and file a notice in which he states whether
7 he elects to: (1) dismiss the unexhausted claim and go forward in
8 this action with only the remaining exhausted claims; or (2) dismiss
9 this action and return to state court to exhaust all of his claims
10 before returning to federal court to present all of his claims in a
11 new petition; or (3) move for a stay of these proceedings while he
12 exhausts his state court remedies for the unexhausted claims.

13 If Petitioner chooses Option (1) or Option (2), his filing
14 need not be a long document; it is sufficient if he files a one-page
15 document entitled "Election By Petitioner" and states simply:
16 "Petitioner elects to proceed under Option _____ provided in the
17 Court's Order dated _____." Petitioner must insert a number in
18 place of the blank space to indicate which of the first two options
19 he chooses and insert the date of the Court's Order.

20 If Petitioner chooses Option (3), he must file a motion
21 for a stay in which he explains why he failed to exhaust his
22 unexhausted claim in state court before presenting it to this Court,
23 that his claim is not meritless, and that he is not intentionally
24 delaying resolution of his constitutional claims.

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If Petitioner does not choose one of the three options or does not file a motion within thirty (30) days of the date of this Order, the entire action will be dismissed.

IT IS SO ORDERED.

DATED 10/06/2011



THELTON E. HENDERSON
United States District Judge