

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALEX R. SAMARO,

Petitioner,

v.

GARY SWARTHOUT, warden,

Respondent.

No. C 11-5010 SI (pr)

**ORDER GRANTING MOTION TO  
DISMISS AND REQUIRING  
ELECTION BY PETITIONER**

**INTRODUCTION**

Alex R. Samaro, a prisoner at the California State Prison - Solano, filed this action pursuant to 28 U.S.C. § 2254 to challenge his Santa Clara County Superior Court conviction. Respondent has moved to dismiss on the ground that state court remedies have not been exhausted for three of the claims. Petitioner has not opposed the motion. For the reasons discussed below, the court finds that state court remedies were not exhausted for three of the claims and requires petitioner to choose how to deal with this problem.

**BACKGROUND**

The petition challenges Samaro's conviction in Santa Clara County Superior Court. Following a jury trial in 2006, a Santa Clara County jury found Samaro and two co-defendants guilty of home invasion robbery, residential burglary, and aggravated assault. The jury found

1 true sentence enhancement allegations for the robbery charge and found that all three counts  
2 were committed for the benefit of a criminal street gang. On March 21, 2008, Samaro was  
3 sentenced to 23 years to life in prison.

4 Samaro appealed. In 2010, his conviction was affirmed by the California Court of Appeal  
5 and his petition for review was denied by the California Supreme Court. Samaro did not file a  
6 petition for writ of habeas corpus in the California Supreme Court.

## 8 DISCUSSION

9 Prisoners in state custody who wish to challenge collaterally in federal habeas  
10 proceedings either the fact or length of their confinement are required first to exhaust state  
11 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the  
12 highest state court available with a fair opportunity to rule on the merits of each and every claim  
13 they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c).

14 The petition alleged the following five claims, which the court found warranted a  
15 response: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; (3) judicial  
16 misconduct; (4) insufficient evidence to support the gang enhancement; and (5) denial of the  
17 right to confront/cross-examine a witness.

18 Respondent contends that claims 1, 2, and 3 are unexhausted. The court has compared  
19 the petition for review filed in the California Supreme Court with the federal habeas petition to  
20 determine whether all the claims in the latter were included in the former. They were not.  
21 Samaro presented to the California Supreme Court his claims 4 and 5. Those claims are  
22 exhausted. Samaro did not present to the California Supreme Court his claims 1, 2, and 3,  
23 meaning that those claims are unexhausted.

24 Samaro's federal petition contains both exhausted and unexhausted claims and therefore  
25 is a "mixed" petition. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005). The court cannot  
26 adjudicate the merits of a habeas petition containing any claim as to which state remedies have  
27 not been exhausted, such as a mixed petition. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982); *cf.*  
28 28 U.S.C. § 2254(b)(2) (petition may be denied (but not granted) notwithstanding failure to

1 exhaust).

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

9 (1) dismiss the unexhausted claims and go forward in this action with only the exhausted  
10 claims, or

11 (2) dismiss this action and return to state court to exhaust all claims before filing a new  
12 federal petition presenting all of his claims, or

13 (3) file a motion for a stay of these proceedings while he exhausts his unexhausted claims  
14 in the California Supreme Court.

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

25 In *Rhines*, the U.S. Supreme Court discussed the stay-and-abeyance procedure for mixed  
26  
27  
28

1 habeas petitions.<sup>1</sup> The Court cautioned district courts against being too liberal in allowing a stay  
2 because a stay works against several of the purposes of the AEDPA in that it "frustrates  
3 AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of  
4 the federal proceeding" and "undermines AEDPA's goal of streamlining federal habeas  
5 proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior  
6 to filing his federal petition." *Rhines*, 544 U.S. at 277. A stay and abeyance "is only appropriate  
7 when the district court determines there was good cause for the petitioner's failure to exhaust his  
8 claims first in state court," the claims are not meritless, and there are no intentionally dilatory  
9 litigation tactics by the petitioner. *Id.* at 277-78. Any stay must be limited in time to avoid  
10 indefinite delay. *Id.* Reasonable time limits would be 30 days to get to state court, as long as  
11 necessary in state court, and 30 days to get back to federal court after the final rejection of the  
12 claims by the state court. *See id.* at 278; *Kelly v. Small*, 315 F.3d at 1071. If Samaro moves for  
13 a stay, he must show that he satisfies the *Rhines* criteria or must comply with the *King/Kelly*  
14 requirements.

## 16 CONCLUSION

17 Respondent's motion to dismiss is GRANTED. (Docket # 3.)

18 Petitioner must file no later than **February 28, 2013**, a notice in which he states whether  
19 he elects to (1) dismiss the unexhausted claims and go forward in this action with only the  
20

---

21 <sup>1</sup>There is an alternate stay procedure for a petitioner who has some unexhausted claims  
22 he wants to present in his federal habeas action, but it often is unhelpful because statute of  
23 limitations problems may exist for claims that are not sufficiently related to the claims in the  
24 original petition. Under the procedure outlined in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003)  
25 *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007), "(1) a petitioner  
26 amends his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance  
27 the amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state  
28 court to exhaust the deleted claims; and (3) the petitioner later amends his petition and  
re-attaches the newly-exhausted claims to the original petition." *King v. Ryan*, 564 F.3d 1133,  
1135 (9th Cir. 2009) (citing *Kelly*, 315 F.3d at 1070-71). A petitioner seeking to avail himself  
of the *Kelly* three-step procedure is not required to show good cause as under *Rhines*, but rather  
must show that the amendment of any newly exhausted claims back into the petition satisfies  
both *Mayle v. Felix*, 545 U.S. 644, 655 (2005), by sharing a "common core of operative facts"  
and *Duncan v. Walker*, 533 U.S. 167 (2001), by complying with the statute of limitations. *King*,  
564 F.3d at 1141-43.

1 remaining claims, or (2) dismiss this action and return to state court to exhaust all of his claims  
2 before returning to federal court to present all of his claims in a new petition, or (3) moves for  
3 a stay of these proceedings while he exhausts his state court remedies for the unexhausted  
4 claims. If he chooses Option (1) or Option (2), his filing need not be a long document; it is  
5 sufficient if he files a one-page document entitled "Election By Petitioner" and states simply:  
6 "Petitioner elects to proceed under option \_\_\_ provided in the court's Order On Initial Review."  
7 Petitioner would have to insert a number in place of the blank space to indicate which of the first  
8 two options he chooses. If he chooses Option (3), no later than **February 28, 2013**, petitioner  
9 must file a motion for a stay in which he explains why he failed to exhaust his unexhausted  
10 claims in state court before presenting them to this court, that his claims are not meritless, and  
11 that he is not intentionally delaying resolution of his constitutional claims. If he wants to file  
12 a motion under *King/Kelly* to amend his petition (to delete the unexhausted claims) and to stay  
13 this action while he exhausts state court remedies for the unexhausted claims, he may do so no  
14 later than **February 28, 2013**. If petitioner does not choose one of the three options or file a  
15 motion by the deadline, the court will dismiss the unexhausted claims.

16 IT IS SO ORDERED.

17 DATED: January 9, 2013

18   
19 \_\_\_\_\_  
20 SUSAN ILLSTON  
21 United States District Judge  
22  
23  
24  
25  
26  
27  
28