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E-Filed 10/6/14*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GLENN SUNKETT,

No. C 14-0069 RS (PR)

Petitioner,

ORDER STAYING PETITION

v.

WARREN MONTGOMERY, Warden,

Respondent.

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. Respondent correctly contends in his motion to dismiss that the petition contains unexhausted claims.

Consequently, and in response to petitioner’s motion to stay, the petition is STAYED to allow for exhaustion.

DISCUSSION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and

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1 every claim they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*,
2 455 U.S. 509, 515–16 (1982). In fact, a federal district court may not grant the writ unless
3 state court remedies are exhausted or there is either “an absence of available state corrective
4 process” or such process has been “rendered ineffective.” *See* 28 U.S.C. § 2254(b)(1)(A)–
5 (B). If available state remedies have not been exhausted as to all claims, the district court
6 must dismiss the petition. *See Lundy*, 455 U.S. at 510.

7 Respondent is correct that the petition is mixed. A review of the record shows that
8 Claims 1 (the prosecution evidence supported the defense’s alibi defense and the jury erred
9 in finding petitioner guilty beyond a reasonable doubt), 2 (identification process was flawed),
10 8 (counsel’s failure to make a pretrial motion and a motion at the close of the prosecution’s
11 case), 9 (counsel failed to prepare or present an alibi defense), 10 (additional ineffective
12 assistance contentions), 11 (the trial court made an error in determining the sentence), and
13 12 (there was cumulative error) were not presented to the California Supreme Court.

14 The usual practice at this point would be to ask the petitioner whether he wants to
15 dismiss the petition and return to state court to exhaust the unexhausted claim, proceed with
16 the exhausted claims only, or move to stay the petition, exhaust the unexhausted claims and
17 then move to reopen the action. *See Ford v. Hubbard*, 305 F.3d 875, 882–86 (9th Cir. 2002).
18 Petitioner, however, has indicated already that he prefers the final option. (Pet.’s Mot. to
19 Stay, Docket No. 6.)

20 A district court may stay a mixed habeas petition, i.e., a petition containing both
21 exhausted and unexhausted claims, to allow the petitioner to exhaust state court remedies as
22 to those claims that have not yet been presented to the state’s highest court. *See Rhines v.*
23 *Webber*, 544 U.S. 269, 277–78 (2005). In *Rhines*, the Supreme Court discussed the
24 stay-and-abeyance procedure, explaining that a stay and abeyance “is only appropriate when
25 the district court determines there was good cause for the petitioner’s failure to exhaust his
26 claims first in state court,” the claims are not meritless, and there are no intentionally dilatory
27 litigation tactics by the petitioner. *Id.* If the stay is granted, the petitioner does not have to
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1 worry that his newly-exhausted claims will be barred by the statute of limitations because
2 those claims remain pending in federal court. *King v. Ryan*, 564 F.3d 1133, 1139, 1140. (9th
3 Cir. 2009).

4 Petitioner's motion for a *Rhines* stay is GRANTED, good causing appearing therefor.
5 The action is STAYED. Nothing further will take place in this action until the Court decides
6 further action is appropriate, or until petitioner exhausts the unexhausted claims and, within
7 thirty days of doing so, moves both to reopen this action and to lift the stay. Because this
8 order addresses petitioner's and respondent's concerns, respondent's motion to dismiss
9 (Docket No. 5) and petitioner's motion to show a rebuttable presumption (Docket No. 6) are
10 DENIED. The Clerk shall ADMINISTRATIVELY CLOSE the file pending the stay of this
11 action, and terminate Docket Nos. 5 and 6.

12 **IT IS SO ORDERED.**

13 DATED: October 6, 2014


14 RICHARD SEEBORG
15 United States District Judge
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