

1 state judicial remedies as to one of the claims. Specifically, Respondent claims Petitioner failed to
2 raise his Sixth Amendment claim before the California Supreme Court. Respondent concedes that
3 Petitioner's due process claim is exhausted. Therefore, Respondent contends Petitioner has filed a
4 mixed petition, and it must be dismissed pursuant to Rose v. Lundy, 455 U.S. 509, 522 (1982).

5 DISCUSSION

6 **I. Legal Standard**

7 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
8 either the fact or length of their confinement are first required to exhaust state judicial remedies,
9 either on direct appeal or through collateral proceedings, by presenting the highest state court
10 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
11 federal court. See 28 U.S.C. § 2254(b), (c); Rose, 455 U.S. at 515-16; Duckworth v. Serrano, 454
12 U.S. 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988). The state's highest court
13 must be given an opportunity to rule on the claims even if review is discretionary. See O'Sullivan v.
14 Boerckel, 526 U.S. 838, 845 (1999) (Petitioner must invoke "one complete round of the state's
15 established appellate review process.")

16 A petition that contains both exhausted and unexhausted claims is referred to as a "mixed"
17 petition. See Rhines v. Weber, 544 U.S. 269, 277 (2005). A federal district court cannot adjudicate
18 the merits of a habeas petition containing any claim as to which state remedies have not been
19 exhausted, such as a mixed petition. See Rose, 455 U.S. at 522. However, instead of dismissing the
20 action, the court must instruct the petitioner to choose between two alternatives: (1) he can dismiss
21 his unexhausted claims and proceed in federal court only with his exhausted claims; or (2) he can
22 request the district court to dismiss the entire petition without prejudice so he can exhaust his
23 unexhausted claims in state court before filing a new exhausted petition in federal court. See
24 Brambles v. Duncan, 412 F.3d 1066, 1069-71 (9th Cir. 2005). In addition, the United States
25 Supreme Court has held that a district court may stay a mixed habeas petition in order to allow the
26 petitioner to exhaust his unexhausted claims in state court. See Rhines, 544 U.S. at 277. However, a
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1 stay and abeyance "is only appropriate when the district court determines there was good cause for
2 the petitioner's failure to exhaust his claims first in state court," the claims are not meritless, and
3 there are no intentionally dilatory litigation tactics by the petitioner. Id. at 277-78. Moreover, where
4 granting a stay, the district court must effectuate the timeliness concerns of 28 U.S.C. § 2244(d) by
5 placing "reasonable time limits on a petitioner's trip to state court and back." Id. at 277. A
6 petitioner need not delete his unexhausted claims before asking the district court to issue a stay. See
7 Jackson v. Roe, 425 F.3d 654, 659-61 (9th Cir. 2005).

8 **II. Analysis**

9 Petitioner contends his Sixth Amendment claim is exhausted because he included that claim
10 in his petition for review before the California Supreme Court. Petitioner refers to his "5th, 6th, and
11 14th Amendment right to due process" in the table of contents portion of that document. (Resp't Ex.
12 1.) Unlike in the instant federal petition, Petitioner does not reference his Sixth Amendment claim
13 in the body his petition for review. (Id.) Thus, his argument is without merit.

14 Alternatively, Petitioner argues his Sixth Amendment claim is exhausted because it was
15 included in his state appellate court petition. (Opp'n at 2.) This argument is also without merit.
16 Petitioner's petition for review to the California Supreme Court must be complete and may not
17 incorporate by reference the claims in his state appellate court petition. See Cal. Rule of Court
18 8.504(e)(3).

19 The record shows that Petitioner failed to raise his Sixth Amendment claim before the
20 California Supreme Court; therefore, the Court finds this claim unexhausted. The record also shows
21 that Petitioner exhausted his due process claim before the California Supreme Court. (Resp't Ex. 1
22 at 3-5.) Because Petitioner has presented a mixed petition, Respondent's motion to dismiss is
23 GRANTED.

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

- 5 (1) Dismiss the unexhausted claim and go forward in this action with only the exhausted
6 claim; or
- 7 (2) Terminate this action and return to state court to exhaust all of his claims before filing
8 a new federal habeas action containing a petition with only exhausted claims; or
- 9 (3) Request a stay of the proceedings while he completes the exhaustion of his
10 unexhausted claim in the California Supreme Court. If Petitioner chooses this option,
11 he will be required to show that there was good cause for his failure to exhaust the
12 claim in state court and that it is a potentially meritorious claim.

13 Petitioner has elected to dismiss his unexhausted Sixth Amendment claim and proceed with
14 his exhausted due process claim. (Opp'n at 2.) Therefore, Petitioner's unexhausted Sixth
15 Amendment claim is dismissed from this action.

16 In light of the dismissal of Petitioner's unexhausted Sixth Amendment claim, the petition
17 contains only an exhausted due process claim, which Respondent should address on its merits. The
18 Court now sets a new schedule below for the parties to file their briefs pursuant to the September 4,
19 2007 Order to Show Cause.

20 **CONCLUSION**

- 21 1. Respondent's motion to dismiss (docket no. 5) is GRANTED.
- 22 2. Petitioner's Sixth Amendment claim is DISMISSED based on his voluntary dismissal
23 of that claim.
- 24 3. Respondent shall file with this Court and serve upon Petitioner, within **sixty (60)**
25 **days** of the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules
26 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued as
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1 to Petitioner's due process claim. Respondent shall file with the Answer a copy of all portions of the
2 relevant state records that have been transcribed previously and that are relevant to a determination
3 of the issues presented by the petition.

4 4. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with
5 the Court and serving it on Respondent within **thirty (30) days** of his receipt of the Answer. Should
6 Petitioner fail to do so, the petition will be deemed submitted and ready for decision **thirty (30) days**
7 after the date Petitioner is served with Respondent's Answer.

8 5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court
9 and Respondent informed of any change of address and must comply with the Court's orders in a
10 timely fashion. Petitioner must also serve on Respondent's counsel all communications with the
11 Court by mailing a true copy of the document to Respondent's counsel.

12 6. Extensions of time are not favored, though reasonable extensions will be granted.
13 Any motion for an extension of time must be filed no later than **ten (10) days** prior to the deadline
14 sought to be extended.

15 7. This Order terminates Docket no. 5.

16 IT IS SO ORDERED.

17 DATED: 9/5/08


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4
5 HUY DANG,
6 Plaintiff,

Case Number: CV07-03845 SBA

CERTIFICATE OF SERVICE

7 v.
8 B. CURRY et al,

9 Defendant.
_____ /

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
11 Court, Northern District of California.

12 That on September 8, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
15 located in the Clerk's office.

16 Huy Dang H-40124
17 Correctional Training Facility - Soledad
18 P.O. Box 689
19 Soledad, CA 93960-0689

20 Dated: September 8, 2008

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk