

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

JOHN SHAW,
Plaintiff,
v.
ROBERT K. WONG, WARDEN,
Respondent.

No. 09-00077 CW
ORDER GRANTING
RESPONDENT'S
MOTION TO DISMISS
(Docket No. 16)

On January 8, 2009, Petitioner John Shaw, a California state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 20, 2009, Respondent filed a motion to dismiss the petition based on failure to exhaust state remedies. Petitioner filed two identical oppositions on December 14, 2009 and December 21, 2009. On January 26, 2010, Respondent filed a reply. Having considered all the papers submitted by the parties, the Court GRANTS Respondent's motion to dismiss.

BACKGROUND

Petitioner John Shaw, also known as John Hsia, was tried by a jury and found guilty of three counts of grand theft, two counts of forgery, three counts of using personal identifying information

1 without authorization, three counts of recording a false
2 instrument, one count of conspiracy, one count of attempting to
3 dissuade a witness, and one count of false application for a
4 driver's license. The jury also found two excessive taking
5 enhancements. The trial court sentenced Petitioner to a term of
6 fourteen years and four months.

7 Petitioner filed a timely appeal to the California court of
8 appeal. On January 14, 2008, the appellate court affirmed the
9 trial court's judgment. On February 14, 2008, Petitioner filed a
10 petition for review in the California Supreme Court, asserting two
11 claims: (1) insufficient evidence to convict on counts 9 and 10 --
12 conspiracy to dissuade a witness and dissuading a witness -- and
13 (2) failure by the trial court to strike an excessive taking
14 enhancement. The petition was denied on April 9, 2008.

15 On January 8, 2009, Petitioner filed this federal habeas
16 petition. Petitioner asserts the following: (1) Petitioner was
17 denied his "right to confrontation" because the prosecutor failed
18 to provide a copy of the arrest report, failed to question a
19 witness's inconsistent testimony and did not explain why a witness
20 had been placed on the witness list; (2) Petitioner was not read
21 his Miranda rights at the time of his arrest; (3) Petitioner was
22 not told what crimes he was charged with and was detained for
23 months without being informed of his status; (4) Petitioner's trial
24 counsel was ineffective because counsel failed to depose or call
25 witnesses who were crucial to Petitioner's defense; (5) the
26 prosecution presented fraudulent evidence; (6) there was
27 insufficient evidence to prove the false application for a driver's
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1 license; (7) Petitioner was "selectively targeted" for
2 prosecution; (8) the prosecution conspired to defraud Petitioner
3 of his civil rights; (9) the prosecution relied on inconsistent
4 theories regarding a particular piece of evidence; and
5 (10) Petitioner was denied access to a translator and was unable to
6 assist in his defense due to his limited knowledge of the English
7 language. He does not assert the two claims that he raised before
8 the California Supreme Court.

9 Respondent moves to dismiss all of Petitioner's claims based
10 on failure to exhaust state remedies.

11 LEGAL STANDARD

12 Prisoners in state custody who wish to challenge collaterally
13 in federal habeas proceedings either the fact or length of their
14 confinement are first required to exhaust state judicial remedies,
15 either on direct appeal or through collateral proceedings, by
16 presenting the highest state court available with a fair
17 opportunity to rule on the merits of each and every claim they seek
18 to raise in federal court. 28 U.S.C. § 2254 (b), (c); Granberry v.
19 Greer, 481 U.S. 129, 133-34 (1987); Rose v. Lundy, 455 U.S. 509,
20 515 (1982).

21 The exhaustion-of-state-remedies doctrine reflects a policy of
22 federal-state comity "to give the state the initial 'opportunity to
23 pass upon and correct' alleged violations of its prisoners' federal
24 rights." Picard v. Connor, 404 U.S. 270, 275 (1971). The
25 exhaustion requirement is satisfied only if the federal claim has
26 been "fairly presented" to the state courts. Id.; Peterson v.
27 Lampert, 319 F.3d 1153, 1155 (9th Cir. 2003)(en banc). The

1 exhaustion requirement may also be satisfied if no state remedy
2 remains available. Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
3 1996). A federal district court must dismiss a federal petition
4 containing any claim as to which state remedies have not been
5 exhausted. Rhines v. Webber, 544 U.S. 269, 273-74 (2005).

6 For purposes of exhaustion, pro se petitions may, and
7 sometimes should, be read differently from counseled petitions.
8 Sandqathe v. Maass, 314 F.3d 371, 378 (9th Cir. 2002) (holding that
9 neither confused arguments nor poor lawyering will necessarily
10 defeat a pro se petitioner's otherwise adequate efforts to assert a
11 federal claim in state court); Peterson v. Lampert, 319 F.3d 1153,
12 1159 (9th Cir. 2003) (en banc) ("[T]he complete exhaustion rule is
13 not to trap the unwary pro se prisoner.").

14 DISCUSSION

15 I. Exhaustion

16 Respondent argues that none of Petitioner's claims were
17 properly presented to the California Supreme Court and therefore
18 none were exhausted. In support of the motion, Respondent has
19 filed a copy of the opinion of the California court of appeal
20 affirming the judgment of conviction, and of Petitioner's petition
21 for review filed in the California Supreme Court. This
22 documentation shows that Petitioner did not exhaust the claims he
23 asserts in his federal habeas petition; neither of Petitioner's
24 claims in his petition for review appear in his federal habeas
25 petition. Petitioner's opposition essentially restates the claims
26 in his federal habeas petition. Therefore, his petition must be
27 dismissed because all his claims are unexhausted.

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1 Accordingly, the Court GRANTS Respondent's motion to dismiss.

2 II. Certificate of Appealability

3 The federal rules governing habeas cases brought by state
4 prisoners have recently been amended to require a district court
5 that dismisses or denies a habeas petition to grant or deny a
6 certificate of appealability in its ruling. See Rule 11(a), Rules
7 Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (effective December
8 1, 2009).

9 For the reasons stated above, Petitioner has not shown "that
10 jurists of reason would find it debatable whether the district
11 court was correct in its procedural ruling." Slack v. McDaniel,
12 529 U.S. 473, 484 (2000). Accordingly, a certificate of
13 appealability is DENIED.

14 CONCLUSION

15 The instant action must be dismissed because none of
16 Petitioner's claims in his federal habeas petition have been
17 exhausted in state court. The Court GRANTS Respondent's motion to
18 dismiss (Docket No. 16) and DENIES a certificate of appealability.

19
20
21 Dated September 17, 2010

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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

4 JOHN SHAW,
5 Plaintiff,

Case Number: CV09-00077 CW

CERTIFICATE OF SERVICE

6 v.

7 STATE OF CA et al,
8 Defendant.

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

11 That on September 17, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 John Shaw G60830
16 AKA John Hsia
17 Ironwood State Prison
18 CFBI-140L
19 P.O. Box 2199
20 Blythe, CA 9222-2199

21 Dated: September 17, 2010

22 Richard W. Wiekling, Clerk
23 By: Ronnie Hersler, Adm. Law Clerk
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