

United States District Court
For the Northern District of California

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

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

| | |
|----------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| SHAHPOR GHOBADI, Petitioner, v. STATE OF CALIFORNIA, Respondent. | No. C 09-2459 CW (PR) ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PETITION AS UNEXHAUSTED; AND REQUIRING PETITIONER'S ELECTION REGARDING MIXED PETITION |
|----------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising four claims. In an Order dated February 23, 2010, the Court ordered Respondent to show cause why the petition should not be granted.

Before the Court is Respondent's motion to dismiss the petition for failure to exhaust state court remedies (docket no. 12). Petitioner did not file an opposition to the motion.

LEGAL STANDARD

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 every claim they seek to raise in federal court. 28 U.S.C. § 2254 (b), (c); Rose v. Lundy, 455 U.S. 509, 515 (1982).

The exhaustion-of-state-remedies doctrine reflects a policy of federal-state comity "to give the state the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal

1 rights." Picard v. Connor, 404 U.S. 270, 275 (1971)(citations
2 omitted). The exhaustion requirement is satisfied only if the
3 federal claim has been "fairly presented" to the state courts.
4 Id.; Peterson v. Lampert, 319 F.3d 1153, 1155 (9th Cir. 2003)(en
5 banc). A federal district court must dismiss a federal petition
6 containing any claim as to which state remedies have not been
7 exhausted. Rhines v. Webber, 544 U.S. 269, 273-74 (2005).

8 DISCUSSION

9 Petitioner raises four claims in his petition: (1) the
10 sentence was cruel and unusual; (2) insufficient evidence supports
11 his conviction on all counts; (3) Petitioner was improperly
12 prevented from presenting evidence; and (4) the trial court should
13 have imposed concurrent rather than consecutive sentences.
14 Respondent argues that Petitioner has filed a "mixed petition"
15 containing one exhausted claim and three unexhausted claims.
16 Respondent, therefore, asks the Court to dismiss the petition.

17 There is no dispute that Petitioner "fairly presented" claim
18 three to the California Supreme Court in his petition for review;
19 therefore, it is an exhausted claim. (Mot. to Dismiss at 3, Ex.
20 B.) However, the other claims were not included in his petition
21 for review. (Id., Ex. B.) There is no evidence that the
22 California Supreme Court had a fair opportunity to rule on the
23 merits of claims one, two¹ and four. (Id.) Thus, Petitioner has

24

25

26 ¹ Petitioner argued insufficient evidence as to count two and
27 counts five through eight in his petition for review; therefore,
28 his claim of insufficient evidence as to counts one, three and four
was not "fairly presented" to the California Supreme Court.

1 filed a "mixed petition" composed of one exhausted claim and three
2 unexhausted claims.

3 A district court must dismiss "mixed petitions" containing
4 both exhausted and unexhausted claims. Rose, 455 U.S. at 522.
5 Before entering a judgment of dismissal, however, a district court
6 must provide a petitioner with an opportunity to amend the "mixed
7 petition" by striking his unexhausted claims. Jefferson v. Budge,
8 491 F.3d 1013, 1016 (9th Cir. 2005) (citing Rhines, 544 U.S. at 277
9 (2005)). Alternatively, a court may stay the "mixed petition" while
10 the petitioner returns to state court to exhaust the unexhausted
11 claims. Rhines, 544 U.S. at 277.

12 Accordingly, Petitioner may chose either to (1) amend his
13 petition by deleting his unexhausted claims and proceed only with
14 his exhausted claim or (2) request a stay of his petition while he
15 exhausts his unexhausted claims in state court. Petitioner is
16 advised, however, that if he strikes the unexhausted claims and
17 proceeds only with the exhausted claim, the abuse of writ doctrine
18 will bar him from raising the unexhausted claims in future federal
19 habeas proceedings. If Petitioner exhausts his unexhausted claims
20 by way of a state habeas petition, Petitioner may then return to
21 federal court on all of his exhausted claims.

22 Within fourteen (14) days of the date of this Order,
23 Petitioner must submit a request to dismiss his unexhausted claims
24 and proceed with his exhausted claim (claim three) or a request to
25 stay the petition while he returns to state court to exhaust his
26 unexhausted claims. If he does neither, the Court will dismiss the
27 petition for failure to exhaust state judicial remedies.

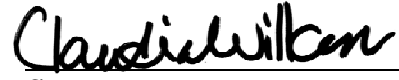
28

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

This Order terminates Docket no. 12.

IT IS SO ORDERED.

Dated: 12/9/2010



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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

4 SHAHPOR GHOBADI,

5 Plaintiff,

6 v.

7 STATE OF CALIFORNIA et al,

8 Defendant.

Case Number: CV09-02459 CW

CERTIFICATE OF SERVICE

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

11 That on December 9, 2010, I SERVED a true and correct copy(ies) of the attached, by placing
12 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
13 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
14 delivery receptacle located in the Clerk's office.

15 Shahpor Ghobadi F-18677
16 CALIFORNIA SUBSTANCE ABUSE TREATMENT FACILITY (5242)
17 P.O. BOX 5242
18 CORCORAN, CA 93212-5242

19 Dated: December 9, 2010

20 Richard W. Wieking, Clerk
21 By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California