

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

4 ONESIMO GARCIA,

No. C 10-02050 SBA (PR)

5 Petitioner,

**ORDER FOR PETITIONER TO SHOW
CAUSE**

6 v.

7 J. ADAMS, Warden,

8 Respondent.
9 _____/

10 Petitioner, a state prisoner, filed this pro se petition for writ of habeas corpus pursuant to 28
11 U.S.C. § 2254. Petitioner also seeks leave to proceed in forma pauperis. The petition contains three
12 claims, one of which Petitioner asserts was presented to the California Supreme Court; the second
13 (ineffective assistance of appellate counsel) and third (cumulative error) claims have not been
14 presented to any state court. Petitioner admits that he did not exhaust his state remedies as to the
15 two aforementioned claims before filing this petition.

16 **DISCUSSION**

17 **A. Standard of Review**

18 This Court may entertain a petition for writ of habeas corpus "in behalf of a person in
19 custody pursuant to the judgment of a State court only on the ground that he is in custody in
20 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v.
21 Hodges, 423 U.S. 19, 21 (1975).

22 A district court shall "award the writ or issue an order directing the respondent to show cause
23 why the writ should not be granted, unless it appears from the application that the applicant or
24 person detained is not entitled thereto." 28 U.S.C. § 2243. Summary dismissal is appropriate only
25 where the allegations in the petition are vague or conclusory, palpably incredible, or patently
26 frivolous or false. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v.
27 Allison, 431 U.S. 63, 75-76 (1977)).
28

1 **B. Legal Claims**

2 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
3 either the fact or length of their confinement are first required to exhaust state judicial remedies,
4 either on direct appeal or through collateral proceedings, by presenting the highest state court
5 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
6 federal court. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982)

7 As mentioned above, Petitioner did not present two of his claims to the state supreme court
8 for review, either in a petition for review or in a state petition for a writ of habeas corpus. Therefore,
9 his federal petition is mixed, that is, contains both exhausted and unexhausted issues. The general
10 rule is that a federal district court must dismiss a federal habeas petition containing any claim as to
11 which state remedies have not been exhausted. Rose, 455 U.S. at 522. Alternatively, the court may
12 stay mixed petitions to allow the petitioner to exhaust in state court, Rhines v. Webber, 544 U.S.
13 269, 277 (2005), or petitioner may amend to delete the unexhausted issue, Jefferson v. Budge, 419
14 F.3d 1013, 1016 (9th Cir. 2005). Petitioner will be ordered to show cause why this petition should
15 not be treated as mixed.

16 If Petitioner is unable to show cause why this petition should not be treated as mixed, i.e., if
17 he cannot show that the two claims are exhausted, he will be afforded the opportunity to elect one of
18 three choices: (1) to dismiss the petition with an eye to exhausting and then filing a new petition
19 containing all claims; or (2) to amend to delete the unexhausted claims and proceed with the
20 exhausted one; or (3) to ask for a stay to allow exhaustion, see Rhines, 544 U.S. at 277-78.

21 In Rhines, the Supreme Court discussed the stay-and-abeyance procedure, explaining that a stay and
22 abeyance "is only appropriate when the district court determines there was good cause for the
23 petitioner's failure to exhaust his claims first in state court," the claims are not meritless, and there
24 are no intentionally dilatory litigation tactics by the petitioner. Id. If the stay is granted, the
25 petitioner's newly-exhausted claims will be not barred by the statute of limitations, because those
26 claims remain pending in federal court. King v. Ryan, 564 F.3d 1133, 1139, 1140 (9th Cir. 2009).

27 By contrast, where a petitioner deletes his unexhausted claims and seeks a stay of a fully-
28 exhausted petition while he returns to state court to exhaust the unexhausted claims, no showing of

1 good cause is required to stay the petition. Id. Once the claims are exhausted, however, the
2 petitioner must amend his petition to add the newly-exhausted claims; importantly, such amendment
3 must take place within the one-year statute of limitation set forth at 28 U.S.C. § 2244(d)(1), or the
4 newly-exhausted claims will be dismissed as untimely. Id. at 1140-41.

5 **CONCLUSION**

6 Petitioner's application to proceed in forma pauperis is GRANTED. Petitioner shall show
7 cause why this petition would not be treated as mixed within **thirty (30) days** from the date of this
8 Order. If he concedes it is mixed he may elect among the three options set out above. If he elects
9 option three and asks for a stay to exhaust without deleting his unexhausted claims, he should
10 address the Rhines requirements.

11 IT IS SO ORDERED.

12 DATED: 8/25/10


SAUNDRA BROWN ARMSTRONG
UNITED STATES DISTRICT JUDGE

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

4
5
6 ONESIMO GARCIA,
7 Plaintiff,

Case Number: CV10-02050 SBA

CERTIFICATE OF SERVICE

8 v.

9 J ADAMS et al,
10 Defendant.

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

13 That on August 25, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
in the Clerk's office.

16
17 Onesimo Garcia F-86310
18 Pelican Bay State Prison
19 PO Box 7500
Crescent City, CA 95532

20 Dated: August 25, 2010

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