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

JAMAL T. EVERETT,

Petitioner,

v.

M. D. McDONALD, Warden,

Respondent.

No. C 10-04323 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 October 6, 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. 5). Petitioner filed 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) his Sixth
10 and Fourteenth Amendment rights were violated because his family
11 and friends were not allowed in the courtroom during trial and jury
12 selection; (2) the trial court erred in failing to instruct the
13 jury on involuntary manslaughter; (3) the trial court erred in
14 failing to suppress a statement obtained in violation of the Fifth
15 Amendment; and (4) he received ineffective assistance of counsel.
16 Respondent argues that Petitioner has filed a "mixed petition"
17 containing two exhausted claims and two unexhausted claims.
18 Respondent, therefore, asks the Court to dismiss the petition.

19 There is no dispute that Petitioner "fairly presented" claims
20 two and three to the California Supreme Court in his petition for
21 review; therefore, they are exhausted claims. (Mot. to Dismiss at
22 3, Ex. 1.) However, the other claims were not included in his
23 petition for review. (Id., Ex. 1.) There is no evidence that the
24 California Supreme Court had a fair opportunity to rule on the
25 merits of claims one and four. (Id.) Petitioner concedes that
26 claims one and four are unexhausted. (Pet. at 8, 9; Opp'n at 1.)

1 Thus, Petitioner has filed a "mixed petition" composed of two
2 exhausted claims and two 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 claims 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 claims, 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.

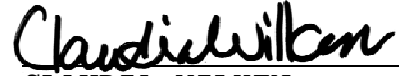
22 Within fourteen (14) days of the date of this Order,
23 Petitioner must submit a request to dismiss his unexhausted claims
24 and proceed with his exhausted claims (claims two and three) or a
25 request to stay the petition while he returns to state court to
26 exhaust his unexhausted claims. If he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

3 This Order terminates Docket no. 5.

4 IT IS SO ORDERED.

5 Dated: 2/7/2011



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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

4 JAMAL T EVERETT,

5 Plaintiff,

6 v.

7 M D MCDONALD et al,

8 Defendant.

Case Number: CV10-04323 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 February 7, 2011, 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 Jamal T. Everett G41163
16 High Desert State Prison
17 P.O. Box 3030
18 Susanville, CA 96127

19 Dated: February 7, 2011

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

United States District Court
For the Northern District of California