

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDGAR ENRIQUE VELASQUEZ,
Petitioner,
v.
ROSEMARY NDOH, Warden,
Respondent.

Case No. [16-cv-02666-HSG](#)

**ORDER DENYING PETITION AND
REQUIRING ELECTION BY
PETITIONER**

Re: Dkt. No. 1

Pending before the Court is a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Dkt. No. 1. Petitioner Edgar Velasquez challenges the validity of the sentence imposed on him in state court. Respondent Rosemary Ndoh, the warden of Avenal State Prison, has filed an answer, Dkt. No. 8, and Petitioner has filed a traverse, Dkt. No. 16. For the reasons set forth below, the Court **DENIES** the petition for failure to exhaust the due process claim. Petitioner is accordingly required to choose how to address the unexhausted claim.

I. BACKGROUND

On March 1, 2013, Petitioner pled no contest to forcible oral copulation upon a child under Cal. Pen. Code § 288a(c)(2)(B) (“Count 1”); forcible lewd acts upon a child under Cal. Pen. Code § 288(b)(1) (“Count 2”); and four counts of lewd acts upon a child under Cal. Pen. Code § 288(a) (“Counts 3–6”). Dkt. No. 9-1 (Clerk’s Transcript, or “CT”) at 114–20; Dkt. No. 9-2 (Reporter’s Transcript, or “RT”) at 5–6.¹ He further admitted enhancement allegations that he had substantial sexual conduct with a child under the age of 14, Cal. Penal Code § 1203.066(a)(8), and that he was at least 16 years old at the time he committed the offenses, Cal. Welf. & Inst. Code §

¹ All references to exhibits are to the exhibits submitted by Respondent in support of the answer, unless otherwise indicated. The Clerk’s Transcript and Reporter’s Transcript are those from the underlying state proceedings.

1 707(d)(1). See CT at 114; RT at 4–5. That same day, the court sentenced Petitioner to a total of
2 eight years in state prison. See CT at 114, 119–20; RT at 18.

3 On appeal, Petitioner claimed that (1) the sentencing court acted unreasonably in imposing
4 the eight-year sentence; and (2) alternatively, trial counsel was ineffective for failing to request a
5 continuance. Dkt. No 9-4, Ex. D (“Ex. D”) at 18–21. On December 9, 2014, the California Court
6 of Appeal affirmed Petitioner’s conviction in an unpublished opinion. Dkt. No 9-5, Ex. E (“Ex.
7 E”) at 27, 34. Petitioner filed a petition for review, raising the same claims as on appeal.
8 Compare Ex. D at 18–21, with Ex. E at 18–24. The California Supreme Court summarily denied
9 review on February 18, 2015. Ex. E at 2 (“The petition for review is denied.”). Petitioner did not
10 pursue state collateral review. The instant petition was filed on May 17, 2016. See Dkt. No. 1
11 (“Pet.”).

12 **II. DISCUSSION**

13 The instant petition asserts two grounds for relief. First, Petitioner claims he was denied
14 his right to due process under the Fourteenth Amendment when the sentencing judge imposed “an
15 eight year prison sentence based on the unreliable and unsubstantiated statement of Jane Doe’s
16 father.” Pet. at 8. Second, and alternatively, Petitioner contends that his trial counsel provided
17 ineffective assistance of counsel (“IAC”) when he failed to request a continuance following the
18 father’s statements in order to ascertain their veracity. Memorandum of Points and Authorities
19 (“Memo”), Dkt. No. 1 at 7–8.

20 Respondent offers three grounds on which denial of Petitioner’s due process claim is
21 warranted. First, Respondent contends that the claim is unexhausted because Petitioner did not
22 fairly present it to the California Supreme Court. Dkt. No. 8-1 at 11. Second, Respondent argues
23 that the claim is procedurally barred. *Id.* at 11–12. Third, Respondent contends that the claim
24 lacks merit. *Id.* Because the Court finds the due process claim to be unexhausted, it need not
25 reach the remaining arguments.

26 **A. Petitioner Failed to Exhaust His Due Process Claim.**

27 The Court agrees that Petitioner failed to exhaust state remedies as to his claim that he was
28 denied his Fourteenth Amendment right to due process because the sentencing judge relied on the

1 statement of Jane Doe’s father.

2 Prisoners in state custody who wish to challenge either the fact or length of their
3 confinement in federal habeas proceedings are required first to exhaust state judicial remedies,
4 either on direct appeal or through collateral proceedings. See 28 U.S.C. § 2254(b)–(c).
5 “[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state
6 courts in order to give the State the opportunity to pass upon and correct alleged violations of its
7 prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). Fair
8 presentation requires that the petitioner present “both the operative facts and the federal legal
9 theory on which his claim is based” to the state court. *Kelly v. Small*, 315 F.3d 1063, 1066 (9th
10 Cir. 2003). It is not sufficient to raise only the facts supporting the claim; rather, “the
11 constitutional claim . . . inherent in those facts” must be brought to the attention of the state court.
12 *Picard v. Connor*, 404 U.S. 270, 277 (1971). In the Ninth Circuit, a petitioner must make the
13 federal basis of the claim explicit either by referencing specific provisions of the federal
14 constitution or statutes or by citing to “federal or state cases involving the legal standard for a
15 federal constitutional violation.” See *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005);
16 *Lyons v. Crawford*, 232 F.3d 666, 668, 670 (9th Cir. 2000), as modified by 247 F.3d 904 (9th Cir.
17 2001). However, a claim is not fairly presented if the state court “must read beyond a petition or a
18 brief” to be alerted to the presence of a federal claim. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

19 Here, in his petition for review to the California Supreme Court, Petitioner did raise his
20 due process claim of sentencing error—but only on state law grounds.² See Ex. E at 20–22 (citing
21 Cal. Pen. Code section 1204 and state cases only). Specifically, Petitioner sought review “under
22 California Rules of Court 8.500(b) to resolve important questions of law—in particular, the issue
23 of what the sentencing court can consider in making a sentencing determination.” *Id.* at 8. The
24 crux of Petitioner’s argument was that the trial court “failed to impose [judgment] in an objective
25 manner” and thereby acted unreasonably in imposing an eight-year sentence. *Id.* at 18–22. While
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27 ² With respect to Petitioner’s due process claim of sentencing error, the statements of facts
28 contained in Petitioner’s opening appellate briefs to the California Court of Appeal and the
California Supreme Court are identical. Compare Ex. D at 7–18, with Ex. E at 10–17.

1 the factual basis offered in support of this claim is the same as that included in his federal habeas
2 petition, the legal basis provided to the state court is grounded solely in state law, and makes no
3 reference to any federal law or provision of the U.S. Constitution. *Id.* Indeed, Petitioner does not
4 use the term “due process” anywhere in his analysis of this claim—the closest he comes is a
5 reference to a “defendant’s right to a[] fair-minded sentencing court.” *Id.* at 20. However, the
6 fair-presentation requirement is not satisfied solely because the “due process ramifications” of an
7 argument may be self-evident. See *Anderson v. Harless*, 459 U.S. 4, 7 (1982). In order to satisfy
8 the exhaustion requirement, Petitioner must have previously presented the claim to the California
9 Supreme Court, “includ[ing] reference to a specific federal constitutional guarantee, as well as a
10 statement of the facts that entitle the petitioner to relief.”³ See *Gray v. Netherland*, 518 U.S. 152,
11 162–63 (1996). Here, because Petitioner did not fairly present the federal basis of the claim to the
12 California Supreme Court, he has not exhausted state court remedies for his due process claim.⁴

13 See *id.*

14 **B. This Is a Mixed Petition, Precluding This Court’s Review.**

15 A mixed petition is one that contains both exhausted and unexhausted claims. See *Robbins*
16 *v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007). A district court cannot adjudicate the merits of a
17 habeas petition containing any claim as to which state remedies have not been exhausted and

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19 ³ Petitioner briefly argues in his reply that he “alleged a federal due process violation throughout
20 his pleadings” by citing California state court cases that “cite and discuss similar due process
21 claims in terms of federal precedent.” Reply Memorandum (“Reply”), Dkt. No. 16-1 at 1.
22 Petitioner points to two such cases, *People v. Peterson*, 9 Cal. 3d 717 (1973) and *People v.*
23 *Arbuckle*, 22 Cal. 3d 749 (1978), that he cited in his petition for review to the California Supreme
24 Court. See *id.*; see also Ex. E at 20–22. But “a state prisoner does not ‘fairly present’ a claim to a
25 state court if that court must read beyond a petition or a brief (or a similar document) that does not
26 alert it to the presence of a federal claim in order to find material, such as a lower court opinion in
27 the case, that does so.” *Baldwin*, 541 U.S. at 32. Petitioner did nothing to alert the state court to
28 the presence of the federal constitutional standards contained in those state cases; instead, he cited
them for general propositions related to his state-law claims. See Ex. E. at 20–22. Because the
court is not required to read beyond the petition itself for purposes of this analysis, any federal
claims contained in those cases were not fairly presented to the state court.

⁴ A district court may deny a habeas petition on the merits even if it is unexhausted. See 28 U.S.C.
§ 2254(b)(2). However, it is not required to do so. See *Gatlin v. Madding*, 189 F.3d 882, 889 (9th
Cir. 1999). The Ninth Circuit has limited Section 2254(b)(2) by noting that courts may deny
unexhausted claims “only when it is perfectly clear that the applicant does not raise even a
colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 623–24 (9th Cir. 2005). The Court
cannot say that Petitioner’s due process claim is not colorable and so declines to reach the merits
at this time.

1 therefore “must dismiss such ‘mixed petitions.’” *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982).

2 Here, the Court has compared the petition for review filed in the California Supreme Court
3 with the federal habeas petition to determine whether the due process claim in the latter was
4 included in the former. It was not. The only federal claim presented in the petition for review to
5 the California Supreme Court is the IAC claim.⁵ Because Petitioner exhausted state court
6 remedies as to the IAC claim, the instant federal petition contains both exhausted and unexhausted
7 claims and is a “mixed” petition, which this Court must dismiss. See *Lundy*, 455 U.S. at 510, 522.
8 But, for the reasons stated below, the Court finds that outright dismissal would be inappropriate at
9 this stage, and instead denies review of the mixed petition until Petitioner elects how he wishes to
10 proceed and informs the Court accordingly. See *Lundy*, 455 U.S. at 522; cf. 28 U.S.C. §
11 2254(b)(2) (providing that petition may be denied (but not granted) notwithstanding failure to
12 exhaust).

13 **C. Petitioner Must Elect How to Proceed.**

14 Although a district court must dismiss a mixed petition, see *Lundy*, 455 U.S. at 522,
15 outright dismissal may be perilous due to the critical one-year statute of limitations on the filing of
16 federal habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996
17 (“AEDPA”), see 28 U.S.C. § 2244(d). District courts, therefore, are reluctant to dismiss mixed
18 petitions (and quite possibly cause a later-filed petition to be time-barred) without giving a
19 petitioner the opportunity to choose how to proceed. Accordingly, prior to dismissing a mixed
20 petition, the district court must provide the petitioner with the opportunity to amend the petition to
21 delete the unexhausted claims and resubmit the petition to include only exhausted claims. See
22 *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir. 2000). Alternatively, the habeas petitioner can
23 dismiss the action to “return[] to state court to exhaust his claims.” See *Lundy*, 455 U.S. at 510.
24 Under *Rhines*, a district court, upon request, also has discretion to stay a mixed petition and hold it
25 in abeyance in order to allow a petitioner time to return to state court and present the unexhausted

26 _____
27 ⁵ The Court notes that Petitioner referenced the Sixth and Fourteenth Amendments of the U.S.
28 Constitution and relevant federal case law in support of his IAC claim in his petition for review to
the California Supreme Court. Ex. E at 7, 22–24; see also Ex. D at 6, 19–21. As such, Petitioner
has exhausted state court remedies as to his IAC claim.

1 claims, and then return to federal court with a perfected petition. See 544 U.S. at 278.⁶ When a
2 district court grants a petitioner’s request for a Rhines stay and holds the petition in abeyance, it
3 tolls AEDPA’s one-year statute of limitations so as not to bar petitioner from returning to federal
4 court after the limitations period has lapsed. See *id.* at 275–76. However, the Supreme Court in
5 *Rhines* cautioned district courts against being too liberal in allowing a stay. A stay and abeyance
6 “is only appropriate when the district court determines there was good cause for the petitioner’s
7 failure to exhaust his claims first in state court,” the claims are not meritless, and there are no
8 intentionally dilatory litigation tactics by the petitioner. *Id.* at 277–78. Any stay must be limited
9 in time to avoid indefinite delay. *Id.* Under *Rhines*, reasonable time limits entail 30 days to return
10 to state court, followed by a time period in state court that is as long as necessary, followed by
11 another 30 days to return to federal court after the final rejection of the claims by the state court.
12 See *id.* at 278.

13 Therefore, instead of an outright dismissal of the action, this Court will allow Petitioner to
14 choose whether he wants to: (1) dismiss the unexhausted due process claim and go forward in this
15 action with only the exhausted claim (“Option 1”); (2) dismiss this action and return to state court
16 to exhaust all claims before filing a new federal petition presenting all of his claims (“Option 2”);
17 or (3) file a motion for a stay of these proceedings while he exhausts his unexhausted claim in the
18 California Supreme Court (“Option 3”).

19 Petitioner is cautioned that each of the options have risks that he should take into account
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21 ⁶ There is an alternate stay procedure, outlined in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003),
22 overruled on other grounds by *Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007), for a petitioner
23 who has some unexhausted claims he wants to present in his federal habeas action. The procedure
24 often is unhelpful, however, because statute of limitations problems may exist for claims that are
25 not sufficiently related to the claims in the original petition. Under the procedure outlined in
26 *Kelly*, “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays
27 and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the
28 opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later
amends his petition and re-attaches the newly-exhausted claims to the original petition.” *King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing *Kelly*, 315 F.3d at 1070–71). A petitioner seeking to avail himself of the *Kelly* three-step procedure is not required to show good cause as under *Rhines*, but rather must show that the amendment of any newly exhausted claims back into the petition satisfies both *Mayle v. Felix*, 545 U.S. 644, 664 (2005), by sharing a “common core of operative facts,” and *Duncan v. Walker*, 533 U.S. 167 (2001), by complying with the statute of limitations. *King*, 564 F.3d at 1141–43.

1 in deciding which option to choose. If he chooses Option 1 and goes forward with only his
2 exhausted claim, he may face dismissal of any later-filed petition. See 28 U.S.C. § 2244(b). If he
3 chooses Option 2 and dismisses this action so he can return to state court to exhaust his due
4 process claim before filing a new federal petition, the new federal petition might be rejected as
5 time-barred. See 28 U.S.C. § 2244(d). If he chooses Option 3, he must file a motion for a stay in
6 this Court showing that he satisfies the Rhines criteria or the King/Kelly requirements. If the
7 motion is granted, he then must act diligently to file a habeas petition in the California Supreme
8 Court, obtain a decision from the California Supreme Court on his unexhausted claims, and return
9 to this Court. Moreover, under Option 3, this action stalls: this Court will do nothing further to
10 resolve the case while Petitioner is diligently seeking relief in state court.

11 **III. CONCLUSION**

12 For the foregoing reasons, the Court orders as follows:

- 13 1. The petition for writ of habeas corpus is **DENIED** for failure to exhaust state court
14 remedies as to the due process claim.
- 15 2. Petitioner is **DIRECTED** to file within 30 days from the date of this order a notice
16 in which he states whether he chooses to: (1) dismiss the unexhausted due process
17 claim and go forward in this action with only his IAC claim; (2) dismiss this action
18 and return to state court to exhaust his due process claim before returning to federal
19 court to present all of his claims in a new petition; or (3) move for a stay of these
20 proceedings while he exhausts his state court remedies for the unexhausted claims.
21 If he chooses Option 1 or Option 2, his filing need not be a long document; it is
22 sufficient if he files a one-page document titled “Notice of Choice By Petitioner”
23 and states simply: “Petitioner chooses to proceed under Option ___ provided in the
24 Order Denying Petition and Requiring Election By Petitioner.” Petitioner would
25 have to insert a number in place of the blank space to indicate which of the first two
26 options he chooses. If he chooses Option 3, within 30 days from the date of this
27 order, Petitioner must file a motion for a stay under Rhines or Kelly/King. If
28 Petitioner does not choose one of the three options or file a motion by the deadline,


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the Court will dismiss the unexhausted due process claim and adjudicate the remaining IAC claim.

This order terminates Docket No. 1.

IT IS SO ORDERED.

Dated: 11/16/2018


HAYWOOD S. GILLIAM, JR.
United States District Judge