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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re:	)	No. C 07-03232 JF (PR)
	)	
BRYANT E. DAVIS	)	ORDER GRANTING MOTION TO
	)	DISMISS WITH LEAVE TO AMEND;
Petitioner,	)	DENYING MOTION TO QUASH
	)	
	)	(Docket Nos. 10 & 13)
	)	

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Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant habeas action was transferred to this Court from the Central District of California on June 19, 2007. Respondent filed a motion to dismiss for failure to exhaust state remedies. (Docket No. 10.) Petitioner filed opposition and Respondent filed a reply. The Court will grant the motion and DISMISS the petition with leave to amend.

**BACKGROUND**

According to the petition, an Alameda Superior Court jury convicted Petitioner of second degree murder (Cal. Penal Code § 187) and second degree robbery (Cal. Penal Code § 211). On July 9, 2004, Petitioner was sentenced to a term of ten years in state

1 prison. On direct appeal, the state appellate court affirmed the judgment in 2006.  
2 The state supreme court denied a petition for review in 2006. The instant federal habeas  
3 petition was filed on May 11, 2007. The petition was transferred to this Court on June 19,  
4 2007.

## 6 DISCUSSION

### 7 A. Exhaustion

8 Prisoners in state custody who wish to challenge collaterally in federal habeas  
9 proceedings either the fact or length of their confinement are first required to exhaust  
10 state judicial remedies, either on direct appeal or through collateral proceedings, by  
11 presenting the highest state court available with a fair opportunity to rule on the merits of  
12 each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b),(c);  
13 Rose v. Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S. 1, 3  
14 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).

15 Respondent contends that the instant petition is a mixed petition because it  
16 contains both exhausted and unexhausted claims, and therefore must be dismissed, Rose  
17 v. Lundy, 455 U.S. 509 (1982). (Resp't Mot. 4.) Respondent has submitted copies of  
18 Petitioner's direct appeal briefs, petition for review in the California Supreme Court, and  
19 state habeas petitions showing that Petitioner failed to present all the claims raised in the  
20 instant federal petition before the state high court. In the instant federal habeas petition,  
21 Petitioner alleged the following two claims: (1) denial of his Sixth Amendment right to  
22 effective assistance of counsel ; and (2) denial of his Fifth Amendment right to an  
23 unbiased judge because his waiver of appeal was not voluntary, knowing, and intelligent.  
24 Although Petitioner raised these claims in a state petition for a writ of habeas corpus in  
25 the California Court of Appeal, (Resp't Mot. Ex. G), he did not raise these claims in his  
26 petition for review to the state high court. The only claim he brought before the  
27 California Supreme Court was the claim that his waiver of a right to appeal was not  
28 voluntary, knowing and intelligent because the trial court failed to admonish the

1 Petitioner regarding his right to appeal and Petitioner did not execute a written waiver.  
2 (Resp't Mot. Ex. E.) This claim is not the same as his federal claim of an "unbiased  
3 judge." Therefore, it cannot be said that he presented the highest state court with a fair  
4 opportunity to rule on the merits of either of the two claims he brings in the instant  
5 federal petition. See 28 U.S.C. § 2254(b),(c); Rose, 455 U.S. at 515-16.

6 A federal district court must dismiss such a "mixed" federal habeas petition, *i.e.*, a  
7 petition containing any claims as to which state remedies have not been exhausted under  
8 28 U.S.C. § 2254(b)-(c). See Rose, 455 U.S. at 522. Alternatively, Petitioner may amend  
9 the mixed petition by striking unexhausted claims as an alternative to suffering dismissal  
10 before the Court may dismiss the petition. Jefferson v. Budge, 419 F.3d 1013, 1016 (9th  
11 Cir. 2005); Brambles v. Duncan, 412 F.3d 1066, 1069-71 (9th Cir. 2005). As a third  
12 alternative, Petitioner may obtain a stay of the instant petition while he exhausts his  
13 unexhausted claims in state court. District courts have the authority to issue stays of  
14 mixed federal habeas petitions, and the AEDPA does not deprive them of that authority.  
15 Rhines v. Webber, 125 S. Ct. 1528, 1535 (2005). The use of a stay and abeyance is only  
16 appropriate, however, where the district court has first determined that there was good  
17 cause for the Petitioner's failure to exhaust the claims in state court and that the claims  
18 are potentially meritorious. Id. If Petitioner wishes to obtain a stay, he must file a motion  
19 to stay the petition that includes a showing of good cause for his failure to exhaust his  
20 unexhausted claims prior to filing the present petition.

## 21 22 CONCLUSION

23 In light of the foregoing, the Court hereby orders as follows:

24 1. Respondent's motion to dismiss (Docket No. 10) is GRANTED. The  
25 petition is hereby DISMISSED WITH LEAVE TO AMEND. Within **thirty (30) days** of  
26 the date this order is filed, Petitioner may file an amended petition that includes only his  
27 exhausted claim, and that strikes all of the unexhausted claims. The amended petition  
28 must also set forth a violation of a federal constitutional right or other federal law with

1 respect to each claim, and any such violation of federal law must have been presented to  
2 the California Supreme Court in order for the claim to be properly raised in the amended  
3 petition. The amended petition must be on this Court's form for habeas petitions, it must  
4 include the caption and civil case number used in this order, No. C 07-01443 JF (PR), as  
5 well as the words AMENDED PETITION on the first page, and Petitioner may not  
6 incorporate material from the original petition by reference.

7 **Failure to file an amended petition in conformity with this order shall result**  
8 **in the dismissal of this action without prejudice to Petitioner's later filing a new**  
9 **petition after he has finished exhausting his claims in state court.**

10 2. If Petitioner files an amended petition in conformity with this order, and  
11 there are additional claims he wishes to pursue that have not been exhausted, Petitioner  
12 may file, **at the same time as he files the amended petition**, a motion to stay the instant  
13 petition while he exhausts his unexhausted in the state courts. Such a motion must be  
14 accompanied by a showing of good cause why the unexhausted claims were not  
15 exhausted prior to filing the present petition, and a showing that the unexhausted claims  
16 potentially have merit.

17 3. Petitioner's opposition motion to quash Respondent's motion to dismiss  
18 (Docket No. 13), is DENIED.

19 This order terminates Docket No. 10 & 13.

20 IT IS SO ORDERED.

21 DATED: 9/12/08

  
22 JEREMY FOGEL  
United States District Judge