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

10 WILFREDO C. CAUYONG,) No. C 12-02606 EJD (PR)
11 Petitioner,)
12 vs.) ORDER GRANTING MOTION TO
13) STAY; INSTRUCTIONS TO CLERK
14 CONNIE GIBSON, Warden,)
15 Respondent.)
16 _____) (Docket No. 2)

17 Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas
18 corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Petitioner has paid
19 the filing fee. (Docket No. 4.) Petitioner requests that the instant petition be stayed to
20 allow him to exhaust unexhausted claims in the state courts.

21
22 **STATEMENT**

23 Petitioner was found guilty by a jury in San Mateo County Superior Court of
24 twenty-four counts of violating Penal Code § 288(a) (oral copulation). (Pet. 2.) On May
25 11, 2009, Petitioner was sentenced to twenty-four years in state prison. (Id.)

26 The state appellate court affirmed the judgment, and the state high court denied
27 review on in 2011. (Id. at 3.) Petitioner filed a habeas petition in the California Supreme
28 Court on May 11, 2012, which remains pending. (Id.) Petitioner filed the instant federal

petition on May 11, 2012.

DISCUSSION

A. Motion to Stay

Petitioner alleges numerous claims under the Fifth, Sixth and Fourteenth Amendments, which he admits includes unexhausted claims. Petitioner claims that he filed a state habeas petition purely to exhaust claims which his defense counsel refused to appeal. (Mot. at 2; Docket No. 2.) Petitioner requests the Court to stay and abey the petition to permit him to exhaust all claims in state court.

Prisoners in state custody seeking 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. See 28 U.S.C. § 2254(b),(c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988). The exhaustion requirement is satisfied only if the federal claim (1) has been “fairly presented” to the state courts, see id.; Crotts v. Smith, 73 F.3d 861, 865 (9th Cir. 1996); or (2) no state remedy remains available, see Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Peterson v. Lampert, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). Petitioner admits that several ineffective assistance of counsel claims are currently pending before the state high court, and were not exhausted at the time he filed the instant petition. See 28 U.S.C. § 2254(b),(c). Accordingly, the instant petition is a mixed petition.

District courts have the authority to issue stays and AEDPA does not deprive them of that authority. Rhines v. Webber, 544 U.S. 269, 277-78 (2005). However, the district court’s discretion to stay a mixed petition is circumscribed by AEDPA’s stated purposes of reducing delay in the execution of criminal sentences and encouraging petitioners to seek relief in the state courts before filing their claims in federal court. Id. at 277.

1 Because the use of a stay and abeyance procedure has the potential to undermine these
2 dual purposes of AEDPA, its use is only appropriate where the district court has first
3 determined that there was good cause for the petitioner's failure to exhaust the claims in
4 state court and that the claims are potentially meritorious. Id. The Court finds that
5 Petitioner has not engaged in dilatory tactics and the unexhausted claims are potentially
6 meritorious. Consequently, Petitioner's motion to stay this action while he exhausts all
7 claims in the state high court will be granted.

8
9 **CONCLUSION**

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

11 1. Petitioner's motion to stay the petition is GRANTED, (Docket No. 2), and
12 the above-titled action is hereby STAYED until **thirty (30) days** after the state high
13 court's final decision on Petitioner's unexhausted claims.

14 2. If Petitioner intends to have this Court consider the unexhausted claims, he
15 must have properly presented them to the Supreme Court of California, and if he has not
16 obtained relief in state court, thereafter notify the Court **within thirty (30) days** of the
17 California Supreme Court's decision, by filing a motion to reopen this action and stating
18 therein that all the claims in the instant federal petition have been exhausted.

19 3. The Clerk shall ADMINISTRATIVELY CLOSE the file pending the stay
20 of this action. This has no legal effect; it is purely a statistical procedure. When
21 Petitioner informs the Court that he has exhausted his additional claims, the case will be
22 administratively re-opened.

23 This order terminates Docket No. 2.

24
25 Dated: 7/24/2012


EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WILFREDO CORTEZ CAUYONG,
Petitioner,

Case Number: CV12-02606 EJD

CERTIFICATE OF SERVICE

v.

CONNIE GIBSON, Warden,
Respondent.

_____/

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

That on 7/25/2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Wilfredo Cortez Cauyong G-60779
Corcoran State Prison
P. O. Box 3471
Corcoran, CA 93212-3471

Dated: 7/25/2012

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk