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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RANDY ROYAL JOHNSON,

Petitioner,

vs.

GREG SMITH, *et al.*,

Respondents.

3:09-cv-00561-LRH-RAM

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review under Rule 4 of the Rules Governing Section 2254 Cases and on petitioner's motions (## 8 & 9) for appointment of counsel. On initial review, a substantial question exists as to whether the petition is subject to dismissal because all of the claims are not exhausted. Petitioner therefore will be directed to show cause in writing why the petition is not subject to potential dismissal as a mixed petition for lack of exhaustion, absent dismissal of any unexhausted claims or other appropriate action.

Background

The papers presented reflect the following.

Petitioner Randy Royal Johnson was convicted, pursuant to a jury verdict, of robbery with the use of a deadly weapon, and, pursuant to a guilty verdict, of possession of a firearm by an ex-felon. His direct appeals from the two judgments of conviction were consolidated, and both judgments were affirmed. He filed a *pro se* state post-conviction petition, and counsel was appointed. Counsel filed a supplemental petition, and an evidentiary hearing was held. The state district court denied relief, and

1 state post-conviction counsel pursued an appeal to the state supreme court, which affirmed.

2 Petitioner thereafter filed a *pro se* original petition for extraordinary relief in the state supreme
3 court. That court denied the petition expressly “without deciding upon the merits of any claims,”
4 noting, *inter alia*, that a challenge to a conviction must be raised in a post-conviction petition filed in
5 the state district court.

6 ***Governing Law***

7 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court remedies
8 on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement,
9 the claim must have been fairly presented to the state courts completely through to the highest court
10 available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156
11 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the
12 petitioner must refer to the specific federal constitutional guarantee and must also state the facts that
13 entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983,
14 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with
15 both the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo v.*
16 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the state courts,
17 as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged
18 violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731, 111
19 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

20 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed petition
21 presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the
22 petitioner dismisses the unexhausted claims and/or seeks other appropriate relief.

23 ***Discussion***

24 The federal petition contains nine grounds. The only claims in the petition that are exhausted
25 are claims in Ground 1 alleging: (a) that trial counsel were ineffective for failing to object to an order
26 requiring Johnson to wear a stun belt; (b) that appellate counsel was ineffective for failing to raise the
27 issue on direct appeal; and (c) that the order deprived Johnson of Fifth, Sixth and Fourteenth
28 Amendment rights to due process, a fair trial, to appear before jurors as an innocent person, to be

1 present at trial and participate in his defense, and to confer with his counsel.

2 The foregoing claims in Ground 1 were presented to and/or considered by, either on the merits
3 or on the basis of a procedural bar, the Supreme Court of Nevada on the state post-conviction appeal.

4 Petitioner concedes in the petition and associated papers that the substantive claims and claims
5 of ineffective assistance of counsel in Grounds 2 through 9 were not presented to the state supreme
6 court on direct appeal.¹

7 Petitioner further concedes that Grounds 3, 5, 6, 8 and 9 were not presented in the state post-
8 conviction petition.²

9 Petitioner maintains that Grounds 2, 2A, 4 and 7 were presented in his state post-conviction
10 petition. However, any such claims clearly were not pursued through to or considered by the Supreme
11 Court of Nevada on the state post-conviction appeal. Only the claims outlined above under Ground 1
12 were presented to and/or considered by the Supreme Court of Nevada on the state post-conviction
13 appeal.³ To satisfy the exhaustion requirement, the claim must have been fairly presented to the state
14 courts completely through to the Supreme Court of Nevada. *E.g., Peterson, supra; Vang, supra.*
15 Grounds 2, 2A, 4 and 7, to the extent *arguendo* presented in the district court, therefore were not
16 exhausted on state post-conviction review because they were not presented on the state post-conviction
17 appeal.

18 Grounds 2, 2A, 3, 4, 5, 6, 7, 8 and 9 thus were not exhausted either on direct appeal or in the
19 state post-conviction proceedings.

20 Petitioner contends, however, that Grounds 2, 2A, 3, 4, 6, 7, 8 and 9 (Ground 5 is discussed
21 separately, *infra*) were exhausted by the original petition for extraordinary relief that he filed in the
22 Supreme Court of Nevada. Under well-established law, however, the original petition did not fairly
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24 ¹ See Petition (#7), at 12, 17, 20, 25, 30, 32, 35 & 37; Notice (#11), at electronic docketing page 2. *Inter alia*, 1
25 Ground 2A alleges violations based upon an alleged conflict between the federal Speedy Trial Act and the Nevada state
26 speedy trial statute. Ground 8 refers to a deprivation of a “speedy, public trial,” but alleges jury instruction error. Such
27 claims were not presented or considered on direct appeal.

28 ² See Petition (#7), at 20, 30, 35 & 37; Notice (#11), at electronic docketing page 2.

³ See Fast Track Statement (filed with #11); February 4, 2009, Order of Affirmance (filed with #5, at electronic
docketing pages 87-90).

1 present and exhaust any claims.

2 The state supreme court denied the original petition on the following grounds:

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4 This is a proper person petition for extraordinary relief. We have
5 reviewed the documents submitted in this matter, and without deciding
6 upon the merits of any claims, we decline to exercise original
7 jurisdiction in this matter. NRS 34.170, NRS 34.330; NRS
8 34.724(2)(b); NRS 34.738(1). To the extent petitioner challenges the
9 validity of his judgment of conviction and sentence, such a challenge
10 must be raised in a post-conviction petition for a writ of habeas corpus
11 in the district court in the first instance.[FN1] NRS 34.724(2)(b); NRS
12 34.738(1). To the extent petitioner challenges the district court's
13 resolution of his post-conviction petition for a writ of habeas corpus ,
14 petitioner received the opportunity to raise those claims in his appeal
15 from the denial of that petition, and failed to do so. Accordingly, we

16 ORDER the petition DENIED.

17 [FN1] We express no opinion as to whether petitioner
18 could meet the procedural requirements of NRS chapter
19 34.

20 August 24, 2009, Order (filed with #5, at electronic docketing pages 113-14).

21 The Supreme Court of Nevada thus clearly and expressly declined to exercise its original
22 jurisdiction, stated that it did not consider the merits of petitioner's claims, and stated that the procedure
23 for petitioner to follow was to file a post-conviction petition in the state district court.

24 It is long-established law that a claim is not fairly presented and is not exhausted when a
25 petitioner fails to present the claim in state district court under available state post-conviction
26 procedures and instead presents the claim in an original petition to the state's high court seeking to
27 invoke an extraordinary discretionary jurisdiction. *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 488, 95
28 S.Ct. 1748, 1752, 44 L.Ed.2d 317 (1975); *Ex part Hawk*, 321 U.S. 114, 116, 64 S.Ct. 448, 449-50, 88
L.Ed. 572 (1944); *Sweet v. Cupp*, 640 F.2d 233, 238 (9th Cir. 1981). *Accord Lindquist v. Gardner*, 770
F.2d 876 (9th Cir. 1985). *See also Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103
L.Ed.2d 380 (1989)(presenting a claim in a procedural context in which the merits of the claim will not
be considered, or will be considered only in special circumstances, does not constitute fair presentation
of the claim); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994)(applying rule to filing of original
petition in state high court).

The Supreme Court of Nevada has a longstanding policy of declining to exercise its original

1 jurisdiction due to the availability of post-conviction remedies in the state district courts. The Supreme
2 Court of Nevada reaffirmed this longstanding policy of declining to exercise its original jurisdiction in
3 *Hosier v. State*, 121 Nev. 409, 411-12, 117 P.3d 212, 213-14 (2005). In the present case, the state high
4 court, consistent with *Hosier*, expressly declined to exercise its original jurisdiction, stated that it did
5 not consider the merits, and directed petitioner to post-conviction remedies in the state district court.
6 It thus is clear that the original petition in this case did not exhaust any claims.

7 Grounds 2, 2A, 3, 4, 6, 7, 8 and 9 therefore are not exhausted.

8 Petitioner concedes that he did not assert Ground 5 in the original petition for extraordinary
9 relief. He maintains, however, that he asserted the claim in a motion to dismiss filed in the state district
10 court in the original criminal proceeding.⁴ However, again, a claim must be fairly presented through
11 to the state's highest court. Ground 5 therefore also is unexhausted.

12 Petitioner additionally presents parallel legal claims in Ground 1 for violations of the First and
13 Fourth Amendments and for denial of equal protection of the law. These legal theories were neither
14 presented to nor considered by the Supreme Court of Nevada on the state post-conviction appeal. These
15 parallel legal theories are not exhausted.

16 Petitioner therefore must show cause why the petition is not subject to dismissal as a mixed
17 petition due to the presence of the unexhausted federal legal claims.⁵

18 If petitioner contends that he exhausted the claims in papers that are not currently on file in this
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20 ⁴See #11, at electronic docketing pages 2 & 55-66.

21 ⁵Ground 6 further would not appear to be cognizable in federal habeas corpus because the claim challenges the
22 manner in which the state post-conviction proceedings were conducted. *See, e.g., Franzen v. Brinkman*, 877 F.2d 26
23 (9th Cir. 1989).

24 It further does not appear that the Court has jurisdiction over any challenge to the judgment of conviction
25 entered on the guilty plea for possession of a firearm by an ex-felon. The January 24, 2006, judgment of conviction for
26 that offense imposed a minimum term of 12 months and a maximum term of 30 months, with 237 days credit for time
27 served. See #5, at electronic docketing page 11. Even with, *arguendo*, no further sentence credits, the sentence would
28 have fully expired prior to the mailing of the federal petition on or about September 17, 2009. The sentence was
imposed concurrently with rather than consecutively to the sentence on the conviction for robbery with the use of a
deadly weapon. The Court thus would not appear to have jurisdiction over any challenge to the weapon possession
conviction. *See, e.g., Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 1926, 104 L.Ed.2d 540 (1989); *Henry v.*
Lungren, 164 F.3d 1240, 1241 (9th Cir. 1999).

1 case, he must attach copies of the papers with his show cause response.

2 ***Remaining Matters***

3 On the counsel motions, the Sixth Amendment right to counsel does not apply in habeas corpus
4 actions. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C. §
5 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a financially eligible habeas
6 petitioner whenever "the court determines that the interests of justice so require." The decision to
7 appoint counsel lies within the discretion of the court; and, absent an order for an evidentiary hearing,
8 appointment is mandatory only when the circumstances of a particular case indicate that appointed
9 counsel is necessary to prevent a due process violation. *See, e.g., Chaney v. Lewis*, 801 F.2d 1191, 1196
10 (9th Cir.1986); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir.1965). Having reviewed the requests for
11 counsel, the pleadings, and the remaining papers on file, the Court finds that the interests of justice do
12 not require that counsel be appointed. Petitioner has demonstrated the ability to adequately articulate
13 his claims and arguments.

14 IT THEREFORE IS ORDERED that, within thirty (30) days of entry of this order, petitioner
15 shall show cause in writing why the petition is not subject to dismissal as a mixed petition because the
16 following claims are not exhausted: (a) the claims in Ground 1 alleging violations of the First and
17 Fourth Amendments and denial of equal protection of the law; and (b) Grounds 2, 2A, 3, 4, 5, 6, 7, 8
18 and 9 in their entirety.

19 IT FURTHER IS ORDERED that petitioner's motions (## 8 & 9) for appointment of counsel
20 are DENIED.

21 If petitioner does not timely respond to this order, the entire petition will be dismissed without
22 further advance notice. If petitioner responds to this order but fails to demonstrate that the exhaustion
23 requirement has been satisfied as to all of the claims identified above, the petition will be subject to
24 dismissal for lack of exhaustion, unless petitioner either dismisses the unexhausted claims and/or seeks
25 other appropriate relief.

26 DATED this 3rd day of May, 2010.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE