

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

JOHN WHITEHORSE VANN,¹

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Case No. 3:15-cv-00117-SLG

ORDER REGARDING PETITION

On July 9, 2015, John Whitehorse Vann, a state prisoner representing himself, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, challenging his 30-year sentence and conviction for sexual assault and kidnapping in State of Alaska Superior Court Case Number 3SW-03-00116CR.² Under Rule 4 of the Rules Governing Section 2254 Cases, the Court must review the petition to determine whether “it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.”³ If so, “the judge must dismiss the petition.”⁴

¹ The Court notes that Mr. Vann’s middle name is listed as “Lee” rather than “Whitehorse” in his state court criminal proceedings. *John Lee Vann v. State of Alaska*, 229 P.3d 197 (2010).

² Docket 1.

³ Rules Governing § 2254 Cases in the United States District Courts, Rule 4. See 28 U.S.C. § 2243.

⁴ *Id.*

1. When filing a federal habeas petition, a petitioner must comply with the Antiterrorism and Effective Death Penalty Act.

A petition filed under § 2254 “is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).”⁵ The Supreme Court explains as follows:

AEDPA instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court’s decision only if it was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). The prisoner bears the burden of rebutting the state court’s factual findings “by clear and convincing evidence.” § 2254(e)(1). . . . [This Court] reiterate[s] “that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” . . . AEDPA likewise imposes a highly deferential standard for reviewing claims of legal error by the state courts: A writ of habeas corpus may issue only if the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. § 2254(d)(1).⁶

Under § 2254, habeas relief is available to a state prisoner only if his custody violates federal law.⁷ A claim for habeas relief must include reference to a *specific*

⁵ *Clark v. Arnold*, 769 F.3d 711, 724 (9th Cir. 2014).

⁶ *Burt v. Titlow*, ___ U.S. ___, 134 S.Ct. 10, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

⁷ See *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (“[I]t is only noncompliance with *federal* law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts. . . . [W]e have repeatedly held that ‘federal habeas corpus relief does not lie for errors of state law.’”) (further internal quotation marks and citations omitted).

federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.⁸

2. A habeas petitioner must fully exhaust his or her state court remedies before bringing a federal petition for writ of habeas corpus.

Habeas relief is not available “unless the applicant has exhausted the remedies available in the courts of the State.”⁹ That is, “[b]efore seeking a federal writ of habeas corpus, a state prisoner must . . . giv[e] the State the ‘opportunity to pass upon and correct’ alleged violations of its prisoners’ federal rights.”¹⁰ To satisfy the exhaustion requirement, a “prisoner must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.”¹¹

Further, the United States Supreme Court has held that “review under §2254(d)(1) is limited to the record that was before the state court that adjudicated

⁸ *Gulbrandson v. Ryan*, 738 F.3d 946, 992 (9th Cir. 2013) (“In order to ‘fairly present’ an issue to a state court, a [habeas] petitioner must ‘present the substance of his claim to the state courts, including a reference to a federal constitutional guarantee and a statement of facts that entitle the petitioner to relief.’”) (citation omitted).

⁹ 28 U.S.C. § 2254(b)(1)(A).

¹⁰ *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations and internal quotation marks omitted).

¹¹ *Wood v. Milyard*, ___ U.S. ___, 132 S.Ct. 1826, 1833 (2012) (citations omitted). In Alaska, a criminal defendant may request discretionary review by the Alaska Supreme Court. See Alaska Statutes §§ 22.05.010, 22.07.020, 22.07.030; Alaska Rules of Appellate Procedure 215, 301, and 302.

the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time, *i.e.*, the record before the state court.”¹²

The Court takes judicial notice¹³ that Mr. Vann appears to have fully exhausted Ground 3, his claim that DNA evidence should not have been presented by one lab technician about the results of DNA testing conducted by another lab technician, in violation of the Confrontation Clause.¹⁴

Mr. Vann, however, brings three other claims for relief. In Ground 1, he claims that he received ineffective assistance of counsel as to several issues; in Ground 2, he claims a “violation of the rape shield law” for being prohibited from presenting evidence of the “complaining witness’ prior false allegations of sexual

¹² *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011); *see also Harrington v. Richter*, 562 U.S. 86, 92 (2011) (“[T]he availability of federal habeas relief is limited with respect to claims previously ‘adjudicated on the merits’ in state-court proceedings.”).

¹³ Judicial notice is “[a] court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact; the court’s power to accept such a fact[.]” *Black’s Law Dictionary* (10th ed. 2014); *see also Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n. 3 (9th Cir. 2005) (“Materials from a proceeding in another tribunal are appropriate for judicial notice.”) (internal quotation marks and citation omitted).

¹⁴ Docket 1 at 8; *Vann v. State*, 229 P.3d 197, *petition for hearing denied*, S-13868 (11/23/10).

assault”; and in Ground 4 he claims that he was denied his right to a speedy trial.¹⁵ The Court of Appeals decision does not mention any of those grounds for relief in its decision on direct appeal.¹⁶

The public record shows that, after Mr. Vann completed his direct appeal, he filed a petition for post-conviction relief in the Superior Court for the State of Alaska.¹⁷ That case was dismissed on January 29, 2015.¹⁸ Mr. Vann has filed an appeal from that decision, which is pending before the Alaska Court of Appeals, and is currently in the briefing stage.¹⁹ Thus, Mr. Vann may be in the process of exhausting his remaining grounds for relief.²⁰

¹⁵ Docket 1 at 5, 7, 10.

¹⁶ *Vann*, 229 P.3d at 211 (“Vann raises one additional claim of error. In the prosecutor’s opening statement at Vann’s trial, the prosecutor told the jury that, during the investigation of the case, the State obtained two search warrants—one warrant to search Vann’s vehicle, and the other warrant requiring Vann to submit to a physical examination for evidence pertinent to a charge of sexual assault.”).

¹⁷ See <http://www.courtrecords.alaska.gov/eservices>, *John L. Vann v. State of Alaska*, 3SW-11-00057CI (filed 8/9/11).

¹⁸ *Id.*

¹⁹ See <http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=A12208>, *John L. Vann v. State of Alaska*, A-12208 (filed 2/17/15).

²⁰ Ground 1 of this Petition contains Mr. Vann’s claim of ineffective assistance of counsel. Docket 1 at 5. Mr. Vann is cautioned that, “[a]s a general matter, each ‘unrelated alleged instance [] of counsel’s ineffectiveness’ is a separate claim for purposes of exhaustion.” *Gulbrandson*, 738 F.3d at 992.

3. The federal habeas statute of limitations is tolled while a properly filed state petition for post-conviction relief is pending.

There is a one-year limitations period in which to file a habeas petition under 28 U.S.C. § 2254:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

... or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.²¹

But under the statute, “[t]his one-year limitations period is tolled during the pendency of a ‘properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim....’ § 2244(d)(2).”²² The Supreme Court explains that “[t]he time that an application for state post-conviction review is ‘pending’ includes the period between (1) a lower court’s adverse

²¹ 28 U.S.C. § 2244(d)(1).

²² *Mardesich v. Cate*, 668 F.3d 1164, 1169 (9th Cir. 2012).

determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law."²³

Direct review of Mr. Vann's judgment became final on November 23, 2010,²⁴ and Mr. Vann did not file his petition for post-conviction relief until August 9, 2011.²⁵ So although the one-year limitations period appears to have been stayed since August 9, 2011, several months of the one-year statute of limitations had already run prior to that date. Therefore, after the post-conviction relief proceeding has been concluded in the state court, and assuming the result is unfavorable to him, Mr. Vann should *immediately* file a petition under 28 U.S.C. § 2254 in this Court if he seeks federal habeas relief.

Mr. Vann may elect to proceed solely on his one exhausted ground for relief now. However, this Court may not consider a second or successive § 2254 petition without first receiving authorization from the Court of Appeals for the Ninth Circuit.²⁶ And federal law limits the type of cases that can be presented in a second

²³ *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (emphasis in original) (citation omitted).

²⁴ See <http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S13868>, *Vann v. State*, S-13868.

²⁵ See <http://www.courtrecords.alaska.gov/eservices/>, *Vann v. State*, 3SW-11-00057CI.

²⁶ See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

or successive application.²⁷ That is, by proceeding now on the one exhausted claim, Mr. Vann risks being precluded from obtaining habeas review of his unexhausted grounds for relief in the future.

4. The respondent in a federal habeas case is the petitioner's custodian.

Mr. Vann has named the State of Alaska as the Respondent in his Petition.²⁸

The Court of Appeals for the Ninth Circuit, however, explains as follows:

It is well-established in our Circuit that a petitioner for habeas corpus relief under 28 U.S.C. § 2254 must name “the state officer having custody of him or her as the respondent to the petition.” *Stanley v. Cal. Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994); see also Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts; “This person typically is the warden of the facility in which the petitioner is incarcerated.” *Stanley*, 21 F.3d at 360. We explained in *Stanley* that “[f]ailure to name the petitioner’s custodian as a respondent deprives federal courts of personal jurisdiction” over the custodian. *Id.*²⁹

IT IS THEREFORE ORDERED:

1. Mr. Vann may file the enclosed Notice of Voluntary Dismissal, without prejudice, on or before **August 31, 2015**. Mr. Vann may then promptly file a timely new Petition for Writ of Habeas Corpus in this Court after all issues that he seeks to raise are exhausted in the state courts by presentation first

²⁷ See 28 U.S.C. § 2244(b)(2).

²⁸ Docket 1 at 1.

²⁹ *Smith v. Idaho*, 392 F.3d 350, 354-55 (9th Cir. 2004) (further citations omitted).

to the Alaska Superior Court then, if he disagrees with that result, to the Alaska Court of Appeals and then, if he disagrees with that result, in a petition for hearing to the Alaska Supreme Court.

2. The Clerk of Court is directed to send form PS09, Notice of Voluntary Dismissal, to Mr. Vann with this Order.
3. In the alternative, on or before **August 31, 2015**, Mr. Vann may file an Amended Petition on the Court's habeas form, using his legal name,³⁰ naming his custodian (the warden) as the respondent, and setting forth only fully exhausted grounds for relief.³¹
4. The Clerk of Court shall send Mr. Vann the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 form, with this Order.

³⁰ *John Lee Vann v. State of Alaska*, 229 P.3d 197 (2010).

³¹ As another alternative, Mr. Vann may file a motion for a stay and abeyance of this case until all of his claims have been exhausted in the state courts. In the case of a "mixed petition" (where some claims are exhausted and others are unexhausted), the United States Supreme Court has "approved the use of stay and abeyance in 'limited circumstances,' . . . [where] '[1] the petitioner had good cause for his failure to exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.'" *Blake v. Baker*, 745 F.3d 977, 980 (9th Cir. 2014) (quoting *Rhines v. Weber*, 544 U.S. 269, 275-76, 278 (2005)). The Ninth Circuit explains that "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify that failure. . . . An assertion of good cause without evidentiary support will not typically amount to a reasonable excuse justifying a petitioner's failure to exhaust." *Id.* at 982 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005)).

5. The Court will take no further action in this case until Mr. Vann complies with this Order. If Mr. Vann fails to comply with this Order, this action will be dismissed without further notice.
6. The Clerk of Court is directed to send a copy of the District Court's handbook, "Representing Yourself in Alaska's Federal Court," to Mr. Vann with this Order.

Dated at Anchorage, Alaska this 29th day of July, 2015.

/s/ SHARON L. GLEASON
United States District Judge