

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UTAH KOON,	)	1:11-cv-00131-SMS-HC
)	
Petitioner,	)	ORDER DISCHARGING ORDER TO SHOW
	)	CAUSE (DOC. 5)
)	
v.	)	ORDER GRANTING PETITIONER'S
	)	MOTION TO AMEND THE PETITION TO
R. E. BARNES, Warden,	)	WITHDRAW UNEXHAUSTED CLAIM
	)	CONCERNING INEFFECTIVE ASSISTANCE
Respondent.	)	OF COUNSEL (DOC. 6)
)	
	)	ORDER REQUIRING RESPONDENT TO
	)	FILE A RESPONSE TO PETITIONER'S
	)	CLAIMS CONCERNING INSTRUCTIONAL
	)	ERROR AND THE INSUFFICIENCY OF
	)	THE EVIDENCE TO SUPPORT HIS
	)	CONVICTION
)	
	)	ORDER SETTING A BRIEFING SCHEDULE
)	
	)	ORDER DIRECTING THE CLERK TO
	)	SERVE DOCUMENTS ON THE ATTORNEY
	)	GENERAL

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 303. Pending before the Court is Petitioner's response to the order to show cause that issued on February 11, 2011.

1 I. Discharge of the Order to Show Cause

2 On February 11, 2011, the Court directed Petitioner to show
3 cause why the petition should not be dismissed as a mixed
4 petition containing both exhausted claims and claims as to which
5 Petitioner's state court remedies had not been exhausted.

6 Petitioner responded to the order to show cause on February
7 25, 2011.

8 Accordingly, the order to show cause will be discharged.

9 II. Amendment of Petition to Withdraw Unexhausted Claim

10 Petitioner alleges three claims in the petition:

11 1) appellate counsel was ineffective for failing to raise on
12 appeal the insufficiency of the evidence to support Petitioner's
13 convictions; 2) an erroneous jury instruction concerning motive,
14 which permitted consideration of unemployment and poverty as
15 evidence tending to show guilt, violated his rights to due
16 process of law and a fair trial in violation of the Fifth, Sixth,
17 and Fourteenth Amendments; and 3) the evidence was insufficient
18 to support his convictions, and thus Petitioner suffered a
19 violation of due process of law. (Pet. 4-5.)

20 In his response to the order to show cause, Petitioner
21 stated that his claim concerning the allegedly ineffective
22 assistance of counsel was unexhausted and moved to amend the
23 petition to withdraw the claim so that the other claims, which
24 Petitioner stated were properly exhausted, could be properly
25 reviewed in this proceeding.

26 Petitioner's motion to amend the petition to withdraw the
27 claim concerning the allegedly ineffective assistance of counsel
28 will be granted, and the action will proceed on Petitioner's

1 remaining claims.

2 III. Response to the Petition

3 With respect to Petitioner's claims concerning the
4 insufficiency of the evidence and instructional error, the Court
5 has conducted a preliminary review of the petition. It is not
6 clear from the face of the petition whether Petitioner is
7 entitled to relief. 28 U.S.C. § 2243.

8 Accordingly, Respondent will be directed to respond to these
9 claims.

10 IV. Disposition

11 Accordingly, it is ORDERED that

12 1) The order to show cause that issued on February 11,
13 2011, is DISCHARGED; and

14 2) Petitioner's motion to amend the petition to withdraw the
15 claim concerning the allegedly ineffective assistance of counsel
16 is GRANTED, and the action will PROCEED on Petitioner's remaining
17 claims; and

18 3) With respect to Petitioner's claims concerning the
19 insufficiency of the evidence and instructional error, pursuant
20 to Rule 4 of the Rules Governing Section 2254 Cases and Rule 16
21 of the Federal Rules of Civil Procedure,¹ the Court hereby
22 ORDERS:

25 ¹The Federal Rules of Civil Procedure "apply to proceedings for habeas
26 corpus ... to the extent that the practice in those proceedings (A) is not
27 specified in a federal statute, the Rules Governing Section 2254 Cases, or the
28 Rules Governing Section 2255 Cases; and (B) has previously conformed to the
practice in civil actions." Fed. R. Civ. P. 81(a)(4). Rule 12 also provides
"[t]he Federal Rules of Civil Procedure, to the extent that they are not
inconsistent with any statutory provisions or these rules, may be applied to a
proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases.

1 a) Respondent SHALL FILE a RESPONSE to the petition²
2 within **SIXTY (60) days** of the date of service of this order. See
3 Rule 4, Rules Governing Section 2254 Cases; Cluchette v. Rushen,
4 770 F.2d 1469, 1473-1474 (9th Cir. 1985) (court has discretion to
5 fix time for filing a response). A response can be made by
6 filing one of the following:

7 1) An ANSWER addressing the merits of the
8 petition. Respondent SHALL INCLUDE with the ANSWER
9 any and all transcripts or other documents necessary
10 for the resolution of the issues presented in the
11 petition. See Rule 5, Rules Governing Section 2254
12 Cases. Any argument by Respondent that a claim of
13 Petitioner has been *procedurally defaulted* SHALL BE
14 MADE in the ANSWER, but must also address the merits of
15 the claim asserted.

16 2) A MOTION TO DISMISS the petition. A
17 motion to dismiss SHALL INCLUDE copies of all
18 Petitioner's state court filings and dispositive
19 rulings. See Rule 5, Rules Governing Section 2254
20 Cases.³

21 b) If Respondent files an answer to the petition,
22

23 ²Respondent is advised that a scanned copy of the petition is available
in the Court's electronic case filing system (CM/ECF).

24 ³Rule 4 of the Rules Governing Section 2254 Cases provides that upon the
25 Court's determination that summary dismissal is inappropriate, the "judge must
26 order the respondent to file an answer, motion, or other response within a
27 fixed time, or to take other action the judge may order." Rule 4, Rules
28 Governing Section 2254 Cases; see also Advisory Committee Notes to Rules 4 and
5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate
the need for filing an answer on the substantive merits of the petition and
that the respondent may file a motion to dismiss for failure to exhaust);
White v. Lewis , 874 F.2d 599, 602-03 (9th Cir. 1989) (providing that a motion
to dismiss pursuant to Rule 4 is proper in a federal habeas proceeding).

1 Petitioner MAY FILE a traverse within **THIRTY (30) days** of the
2 date Respondent's answer is filed with the Court. If no traverse
3 is filed, the petition and answer are deemed submitted at the
4 expiration of the thirty (30) days.

5 c. If Respondent files a motion to dismiss, Petitioner
6 SHALL FILE an opposition or statement of non-opposition within
7 **TWENTY-ONE (21) days** of the date Respondent's motion is filed
8 with the Court. If no opposition is filed, the motion to dismiss
9 is deemed submitted at the expiration of the thirty (30) days.
10 Any reply to an opposition to the motion to dismiss SHALL BE
11 FILED within **SEVEN (7) days** after the opposition is served.

12 d. Unless already submitted, both Respondent and
13 Petitioner SHALL COMPLETE and RETURN to the Court within **THIRTY**
14 **(30) days** a consent/decline form indicating whether the party
15 consents or declines to consent to the jurisdiction of the United
16 States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

17 4. The Clerk of the Court is DIRECTED to SERVE a copy of
18 this order on the Attorney General or his representative.

19 All motions shall be submitted on the record and briefs
20 filed without oral argument unless otherwise ordered by the
21 Court. Local Rule 230(1). Requests for extensions of time will
22 only be granted upon a showing of good cause. All provisions of
23 Local Rule 110 are applicable to this order.

24 IT IS SO ORDERED.

25 **Dated: July 26, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE