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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KERRY DANA HASTINGS,
Petitioner,
v.
CONNIE GIPSON,
Respondent.

Case No. 1:14-cv-01271-GSA-HC
ORDER TO SHOW CAUSE
ECF No. 1

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has consented to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636(c).

On August 13, 2014, Petitioner filed the instant Petition for writ of habeas corpus. He raises the following three grounds for relief in his Petition: (1) Prosecution’s destruction of the photo line-up, which was exculpatory evidence, violated his rights; (2) Prosecution’s improper use of jail house informant audio which was inaudible and a written transcript of recordings violated his rights; and (3) DNA testing was negative for Petitioner’s DNA on the bag of marijuana and the fence.

DISCUSSION

A petitioner who is in state custody and wishes to collaterally challenge his conviction by

1 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
2 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
3 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
4 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
5 1163 (9th Cir. 1988).

6 A petitioner can satisfy the exhaustion requirement by providing the highest state court
7 with a full and fair opportunity to consider each claim before presenting it to the federal court.
8 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);
9 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest
10 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the
11 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);
12 Kenney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992) (factual basis).

13 Additionally, the petitioner must have specifically told the state court that he was raising
14 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
15 669 (9th Cir.2000), amended, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
16 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
17 Supreme Court reiterated the rule as follows:

18 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that
19 exhaustion of state remedies requires that petitioners "fairly
20 presen[t]" federal claims to the state courts in order to give the
21 State the "'opportunity to pass upon and correct alleged violations
22 of the prisoners' federal rights" (some internal quotation marks
23 omitted). If state courts are to be given the opportunity to correct
24 alleged violations of prisoners' federal rights, they must surely be
25 alerted to the fact that the prisoners are asserting claims under the
26 United States Constitution. If a habeas petitioner wishes to claim
27 that an evidentiary ruling at a state court trial denied him the due
28 process of law guaranteed by the Fourteenth Amendment, he must
say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

Our rule is that a state prisoner has not "fairly presented" (and thus
exhausted) his federal claims in state court unless he specifically
indicated to that court that those claims were based on federal law.
See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
2000). Since the Supreme Court's decision in Duncan, this court
has held that the petitioner must make the federal basis of the claim

1 explicit either by citing federal law or the decisions of federal
2 courts, even if the federal basis is “self-evident,” Gatlin v.
3 Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
4 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
5 decided under state law on the same considerations that would
6 control resolution of the claim on federal grounds. Hiivala v.
7 Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
8 88 F.3d 828, 830-31 (9th Cir. 1996);

9 In Johnson, we explained that the petitioner must alert the state
10 court to the fact that the relevant claim is a federal one without
11 regard to how similar the state and federal standards for reviewing
12 the claim may be or how obvious the violation of federal law is.

13 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000).

14 If a petition contains unexhausted claims, a petitioner may, at his option, withdraw the
15 unexhausted claims and go forward with the exhausted claims. Anthony v. Cambra, 236 F.3d
16 568, 574 (9th Cir. 2000) (“[D]istrict courts must provide habeas litigants with the opportunity to
17 amend their mixed petitions by striking unexhausted claims as an alternative to suffering
18 dismissal.”).

19 A petition may be stayed either under Rhines v. Weber, 544 U.S. 269, 276 (2005), or
20 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). A petitioner may move to withdraw the
21 unexhausted claims and move to hold the petition in abeyance while the unexhausted claims are
22 exhausted in state court. See Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003); Ford v. Hubbard,
23 305 F.3d 875 (9th Cir. 2002). However, such a request for a Kelly stay will not be considered by
24 the Court until the petition contains only exhausted claims and it is clear that the petition is not
25 barred by the statute of limitations. In light of the Antiterrorism and Effective Death Penalty Act
26 of 1996’s objectives, for a stay pursuant to Rhines, “stay and abeyance [is] available only in
27 limited circumstances” and “is only appropriate when the district court determines there was
28 good cause for the petitioner’s failure to exhaust his claims first in state court.” Rhines, 544 U.S.
at 277.

Upon review of the Petition, it does not appear that Petitioner has sought review for
grounds one and three in the California Supreme Court. Petitioner stated that he appealed to the
highest state court having jurisdiction over the action and Petitioner included a copy of the
California Supreme Court’s denial of Petitioner’s petition for review. However, Petitioner did

1 not state that grounds one and three were presented to the California Supreme Court in the
2 grounds for relief section of the Petition. Petitioner only stated that grounds one and three were
3 appealed to the California Court of Appeal, Fifth Appellate District. Therefore, it is unclear to
4 the Court whether Petitioner has presented claims one and three to the California Supreme Court.
5 If Petitioner has not sought relief in the California Supreme Court, the Court cannot proceed to
6 the merits of those claims. 28 U.S.C. § 2254(b)(1). Thus, Petitioner must inform the Court
7 whether each of his claims has been presented to the California Supreme Court, and if possible,
8 provide the Court with a copy of the petition filed in the California Supreme Court that includes
9 the claims now presented and a file stamp showing that the petition was indeed filed in the
10 California Supreme Court.

11 Moreover, if the Petition contains unexhausted and exhausted claims, it is a mixed
12 petition. The Court must dismiss a mixed petition without prejudice to give Petitioner an
13 opportunity to exhaust the claims if he can do so. See Rose, 455 U.S. at 521-22.

14 **ORDER**

15
16 Accordingly, IT IS HEREBY ORDERED that Petitioner is ORDERED to SHOW
17 CAUSE within **thirty (30)** days of the date of service of this Order why the Petition should not
18 be dismissed for failure to exhaust state remedies.

19 Petitioner is forewarned that failure to follow this order will result in dismissal of the
20 petition pursuant to Fed. R. Civil Proc. § 41(b) (A petitioner's failure to prosecute or to comply
21 with a court order may result in a dismissal of the action, and the dismissal operates as an
22 adjudication on the merits.).

23
24 IT IS SO ORDERED.

25 Dated: October 7, 2014

/s/ Gary S. Austin
26 UNITED STATES MAGISTRATE JUDGE
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