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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALONZO McKINNEY,
Petitioner,
v.
HEDGEPEETH, Warden,
Respondent.

Case No. 1:15-cv-00059-GSA-HC
ORDER TO SHOW CAUSE

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 November 24, 2014, Petitioner filed his petition in the United States District Court for the Northern District of California. On January 9, 2015, Magistrate Judge Laurel Beeler of the Northern District of California issued an order dismissing Petitioner’s first claim concerning prison conditions and transferring the action to this Court for consideration of the remaining two claims which challenge the execution of Petitioner’s sentence. (ECF No. 4).

The Court has conducted a preliminary review of the petition. Petitioner alleges that he was denied witnesses (including the reporting employee) and evidence at a disciplinary on September 11, 2011 or earlier. Petitioner also alleges that he was denied witnesses (including the reporting employee) at a disciplinary hearing on or about May 9, 2011. Petitioner alleges

1 that the length of his confinement was affected by both of these claims.

2 **I.**

3 **DISCUSSION**

4 **A. Exhaustion**

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

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

17 Additionally, the petitioner must have specifically told the state court that he was raising
18 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
19 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
20 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
21 Supreme Court reiterated the rule as follows:

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

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

2 Our rule is that a state prisoner has not "fairly presented" (and thus
3 exhausted) his federal claims in state court unless he specifically
4 indicated to that court that those claims were based on federal law.
5 See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
6 2000). Since the Supreme Court's decision in Duncan, this court
7 has held that the petitioner must make the federal basis of the claim
8 explicit either by citing federal law or the decisions of federal
9 courts, even if the federal basis is "self-evident," Gatlin v.
10 Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
11 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
12 decided under state law on the same considerations that would
13 control resolution of the claim on federal grounds. Hiivala v.
14 Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
15 88 F.3d 828, 830-31 (9th Cir. 1996);

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

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

21 If a petition contains unexhausted claims, a petitioner may, at his option, withdraw the
22 unexhausted claims and go forward with the exhausted claims. Anthony v. Cambra, 236 F.3d
23 568, 574 (9th Cir. 2000) (“[D]istrict courts must provide habeas litigants with the opportunity to
24 amend their mixed petitions by striking unexhausted claims as an alternative to suffering
25 dismissal.”).

26 Upon review of the Petition, it does not appear that Petitioner has sought review for his
27 claims in the California Supreme Court. Petitioner states that he appealed his conviction to the
28 Court of Appeal and the California Supreme Court, but that he has not filed any other petitions,
applications, or motions. Petitioner states that he filed an amended petition in the United States
District Court for the Northern District of California in case number 14-864 LB. Petitioner has
not attached any supporting documents to the petition. Therefore, it is unclear to the Court
whether Petitioner has presented the instant claims to the California Supreme Court. If Petitioner
has not sought relief in the California Supreme Court for the claims that he raises in the instant
petition, the Court cannot proceed to the merits of those claims. See 28 U.S.C. § 2254(b)(1).
Thus, Petitioner must inform the Court whether each of his claims has been presented to the

1 California Supreme Court, and if possible, provide the Court with a copy of the petition filed in
2 the California Supreme Court that includes the claims now presented and a file stamp showing
3 that the petition was indeed filed in the California Supreme Court. Petitioner should also provide
4 the Court with any orders issued by the California Supreme Court.

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

8 **B. Limitation Period for Filing a Petition for Writ of Habeas Corpus**

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
10 of 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for
11 writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320
12 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc).

13 In this case, the petition was filed on November 24, 2014, and therefore, it is subject to
14 the provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on
15 petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1).
16 As amended, § 2244, subdivision (d) reads:

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

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

21 (B) the date on which the impediment to filing an application created by
22 State action in violation of the Constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

23 (C) the date on which the constitutional right asserted was initially
24 recognized by the Supreme Court, if the right has been newly recognized
by the Supreme Court and made retroactively applicable to cases on
collateral review; or

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

27 (2) The time during which a properly filed application for State post-conviction or
28 other collateral review with respect to the pertinent judgment or claim is pending
shall not be counted toward any period of limitation under this subsection.

1 In most cases, the limitations period begins running on the date that the petitioner's direct
2 review became final. In a situation such as this where the petitioner is challenging a prison
3 disciplinary action, the Ninth Circuit has held that direct review is concluded and the statute of
4 limitations commences when the final administrative appeal is denied. Redd v. McGrath, 343
5 F.3d 1077, 1079 (9th Cir. 2003) (holding that the Board of Prison Term's denial of an inmate's
6 administrative appeal was the "factual predicate" of the inmate's claim that triggered the
7 commencement of the limitations period).

8 Here, Petitioner does not state the date that his administrative appeal concluded, or even,
9 whether he filed an administrative appeal. Therefore, if Petitioner filed an administrative appeal,
10 the limitations period commenced the day after Petitioner was informed that his administrative
11 appeal had been rejected. Under Section 2244(d)(1)(D), Petitioner had one year from the start of
12 the limitations period, absent applicable tolling, in which to file his federal petition for writ of
13 habeas corpus. Petitioner states that he is challenging disciplinary hearings held in May 2011
14 and September 2011. If Petitioner did not file any administrative appeals, the limitations period
15 may have started in May 2011 or September 2011. Petitioner did not file his federal petition
16 until November 24, 2014, which was over three years after the challenged disciplinary
17 proceedings. Petitioner must provide the Court with information about the date that his
18 administrative appeal concluded, so that the Court can determine the limitations period and
19 whether Petitioner has timely filed the instant petition.

20 1. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

21 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed
22 application for State post-conviction or other collateral review with respect to the pertinent
23 judgment or claim is pending shall not be counted toward" the one year limitation period. 28
24 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is
25 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled
26 during the intervals between one state court's disposition of a habeas petition and the filing of a
27 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also
28 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

1 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed
2 application for State post-conviction or other collateral review with respect to the pertinent
3 judgment or claim is pending shall not be counted toward” the one year limitation period. 28
4 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is
5 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled
6 during the intervals between one state court's disposition of a habeas petition and the filing of a
7 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also
8 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

9 In this case, Petitioner has not provided the Court with information about whether he
10 filed any post-conviction collateral challenges related to the claims that he raises in the instant
11 petition. Petitioner must provide the Court with the dates that he filed any petitions in state court
12 in which he raised any of the claims that are in the instant petition, so that the Court can
13 determine whether any state petitions were filed during the limitations period and tolled the
14 limitations period. When a petition is filed after the limitations period had already expired, the
15 collateral challenge had no tolling consequence. Green v. White, 223 F.3d 1001, 1003 (9th
16 Cir.2000) (Petitioner is not entitled to tolling where the limitations period has already run).

17 2. Equitable Tolling

18 The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1)
19 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
20 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department
21 of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541
22 (9th Cir. 1998) (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996)).
23 Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544 U.S. at 418;
24 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002); Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th
25 Cir.1993). In this case, Petitioner claims that on September 11, 2011, or before he was “den[ie]d”
26 access to the Court by Salinas Valley State Prison with court order for summon by Monterey
27 Court.” However, Petitioner does not provide information about why or how he was denied
28 access to the courts. Petitioner also does not state the date that he was able to gain access to the

1 courts. It is also unclear what Petitioner means by “court order for summon by Monterey Court.”

2 **II.**

3 **ORDER**

4
5 Accordingly, IT IS HEREBY ORDERED that Petitioner is ORDERED to SHOW
6 CAUSE within **thirty (30)** days of the date of service of this Order why the Petition should not
7 be dismissed for failure to exhaust state remedies and for failure to adhere to the limitations
8 period of 28 U.S.C. § 2244(d)(1).

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

13
14 IT IS SO ORDERED.

15 Dated: March 18, 2015

16 /s/ Gary S. Austin
17 UNITED STATES MAGISTRATE JUDGE