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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BYRON EUGENE JOHNSON,

Petitioner,

No. 2:04-cv-0253 LKK KJN P

vs.

D.L. RUNNELS, et al.,

Respondents.

ORDER

_____ /

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 4, 2004, petitioner filed the original petition raising the following claims: 1) prosecutorial misconduct (2 claims) 2) ineffective assistance of counsel; and 3) juror misconduct. (Dkt. No. 1.) Only the prosecutorial misconduct claim based on the prosecutor’s removal of an African American juror was exhausted. Accordingly, on July 13, 2004, this action was stayed so that petitioner could exhaust his unexhausted claims.

On October 3, 2005, petitioner filed an amended petition following exhaustion of his unexhausted claims. The amended petition raised the following claims: 1) ineffective assistance of counsel; 2) prosecutorial misconduct; 3) ineffective assistance of appellate counsel; and 4) sentencing error.

1 The amended petition does not raise the one exhausted claim raised in the original
2 petition, i.e. the prosecutor committed misconduct by removing an African American juror. In
3 the traverse, petitioner states that he intended to consolidate the claims raised in the amended
4 petition with those raised in the original petition. Petition, p. 24. Petitioner is ordered to file a
5 short declaration stating whether he intended to raise the exhausted prosecutorial misconduct
6 claim in the amended petition. If petitioner intended to raise that claim, respondent will be
7 ordered to file a supplemental answer addressing that claim.


8 In the answer, respondent states that a 911 tape along with a number of tape
9 recordings of petitioner's jailhouse telephone conversations were played for the jury at trial.
10 Answer, p. 6, fn. 4. Respondent states that these tapes are to be included in the documents to be
11 lodged with the court. The notice of lodging does not reflect that these tapes were lodged with
12 the court.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Within fourteen days of the date of this order, petitioner shall file a short
15 declaration stating whether he intended to raise in the amended petition the prosecutorial
16 misconduct claim based on the prosecutor's dismissal of an African American juror;

17 2. Within twenty-eight days of the date of this order, respondent shall lodge the
18 tapes described in the answer at p. 6, fn. 4.

19 DATED: June 28, 2010

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23 KENDALL J. NEWMAN
24 UNITED STATES MAGISTRATE JUDGE

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