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

PAUL LAWRENCE ALEXANDER

Petitioner,

No. 2:08cv1817 LKK KJN P

vs.

DERRAL G. ADAMS

Respondents.

ORDER

_____ /

Petitioner is a state prisoner proceeding with counsel with an application for writ of habeas corpus under 28 U.S.C. § 2254. He has moved to expand the court record pursuant to Rules 7(a) and (b) governing cases filed under § 2254 in a United States district court. The motion was heard on May 13, 2010. At the conclusion of the hearing, the court ordered supplemental briefing on the timing of petitioner’s motion, which comes some six months after petitioner submitted a similar motion to expand the record and several years after the conclusion of state court proceedings. Upon review of the motion, documents in support and opposition, and having considered the argument of counsel for both parties at the hearing, THE COURT MAKES THE FOLLOWING FINDINGS:

Petitioner seeks to include in the record the sworn affidavit of Terri Shaffer, petitioner’s sister. Petitioner submits the affidavit in support of his claim that he was rendered

1 ineffective assistance of counsel during trial, in violation of his right to counsel under the Sixth
2 Amendment. Specifically, Ms. Shaffer swears that she has “firsthand, personal knowledge” that
3 petitioner wanted to testify at his criminal trial and that she observed and overheard tense
4 conversations between petitioner and his counsel, Paul Chan, who, according to Ms. Shaffer, said
5 “it would not be a good idea.” Decl. of Terri Shaffer ¶¶ 4-5 (Dkt. No. 38-2). Despite his alleged
6 desire to take the witness stand, petitioner never testified. For her part, Ms. Shaffer appeared as a
7 witness at petitioner’s motion for a new trial, on June 3, 2005. She testified about her knowledge
8 of conversations between petitioner and Mr. Chan concerning whether petitioner should testify in
9 his own defense.

10 Respondent opposes the motion, arguing inter alia that 28 U.S.C. § 2254 bars
11 expansion of the record to include evidence that was not presented in state court.¹ Rule 7 of the
12 Rules Governing § 2254 cases allows the district court to expand the record without holding a
13 hearing to adduce the additional evidence. Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th
14 Cir. 2005) (citing 28 U.S.C. foll. § 2254, Rule 7). However, before the record may be
15 supplemented with new evidence, a petitioner must meet the standards set forth in 28 U.S.C. §
16 2254(e)(2) for the conducting of an evidentiary hearing. Id. That statute provides:

17 (2) If the applicant has failed to develop the factual basis
18 of a claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that –

19 (A) The claims relies on –

20 (i) a new rule of constitutional law, made
21 retroactive to cases on collateral review by the Supreme Court, that
was previously unavailable; or

22 (ii) a factual predicate that could not have been
previously discovered through the exercise of due diligence; and

23 (B) The facts underlying the claim would be
24 sufficient to establish by clear and convincing evidence that but for
constitutional error, no reasonable fact-finder would have found

25 ¹ Respondent also objects that addition of the affidavit would render petitioner’s
26 ineffective assistance of counsel claim unexhausted and that the affidavit is inadmissible hearsay.

1 the applicant guilty of the underlying offense.

2 In Williams v. Taylor, 529 U.S. 420, 437 (2000), the Supreme Court held that
3 “[i]f there has been no lack of diligence at the relevant stages of the state court proceedings, the
4 prisoner has not ‘failed to develop’ the facts under § 2254(e)(2)’s opening clause, and he will be
5 excused from showing compliance with the balance of the subsection’s requirements.”

6 In his supplemental brief, petitioner does not argue that he was sufficiently
7 diligent in developing his claim in state court such that expanding the record to include Ms.
8 Shaffer’s declaration is appropriate under § 2254(e)(2). Instead, he argues that the declaration is
9 not “new” evidence at all and therefore not subject to § 2254(e)(2)’s restrictions. He argues that
10 “Ms. Shaffer’s declaration is entirely consistent with the testimony she proffered at the motion
11 for new trial in which she was subject to cross-examination.” Pet. Supp. Brief at 3 (Dkt. No. 45).
12 He contends that Shaffer’s testimony at the hearing was “discontinuous and disjunctive,” and her
13 sworn declaration, submitted nearly five years later, “is necessary to ensure that the meaning and
14 significance of this specific testimony is included in petitioner’s record.” Id. at 2-3.

15 Without ruling on whether “ambiguous” testimony in state court opens the door to
16 expansion of the record without abiding by the restrictions of § 2254(e)(2), the court rejects
17 petitioner’s premise that Ms. Shaffer’s testimony at the hearing on the motion for new trial was
18 so ambiguous as to warrant subsequent clarification. Counsel for petitioner at the state court
19 hearing, Richard Dudek – who happens to be counsel of record in this action as well – elicited
20 clear answers from Ms. Shaffer on the subject of her brother’s desire to testify and his
21 conversations with Chan, his lawyer at the trial. Ms. Shaffer’s testimony is not confusing: she
22 either answers the questions to the extent of her knowledge or she says that she does not know
23 the answer or cannot recall. At the hearing, she stated that she was present during a conversation
24 between her brother and Mr. Chan regarding whether he would testify, but she did not recall how
25 they left that discussion. See Trial Transcript at 640. In her affidavit, she adds to her
26 recollection, stating that during the conversation, Mr. Chan “reacted in a very abrupt and

1 dismissive manner” and petitioner “seemed to [become] very excited and agitated.” Shaffer
2 Decl. ¶ 6. Her new declaration does not resolve ambiguity in her earlier testimony; it simply
3 attempts to color her description at the hearing about a conversation she observed between her
4 brother and his counsel. Petitioner provides no authority, nor is the court aware of any, that
5 would allow an affidavit to revise previous testimony that, in the retrospective light of a
6 subsequent habeas action, a petitioner wishes had been more strongly worded in his favor when it
7 was given.

8 Petitioner also does not sufficiently answer a key question posed at the hearing on
9 his motion to expand the record and sought in the supplemental briefs ordered by the court –
10 namely, why almost five years passed between Ms. Shaffer’s testimony in state court and the
11 submission of her sworn affidavit. Along with petitioner’s supplemental brief, the court has
12 received the declaration of Efren B. Williams, a California attorney who states that he has been
13 “assisting attorney Richard T. Dudek regarding the federal habeas corpus petition which he is
14 litigating on behalf of his client, petitioner Paul Lawrence Alexander.” Decl. of Erfren B.
15 Williams ¶ 2 (Dkt. No. 46). He explains that he did not “verif[y] for myself that Ms. Shaffer had
16 testified during Mr. Alexander’s motion for new trial” until sometime in February or March
17 2010. *Id.* ¶ 6. But Mr. Williams is not counsel of record in this case. Mr. Dudek is petitioner’s
18 counsel and was petitioner’s counsel at the hearing on the motion for a new trial in state court in
19 June 2005. Mr. Dudek called Ms. Shaffer to testify at that hearing, asked her questions about
20 petitioner’s communications with his trial counsel, listened to her answer questions on cross-
21 examination, and declined the opportunity to ask questions on re-direct. See Trial Transcript at
22 637-42. Mr. Dudek indisputably knew the contents of Shaffer’s testimony at all times during the
23 pendency of this action and, before that, petitioner’s state habeas proceedings. Tellingly, he did
24 not seek to clarify any ambiguities in Shaffer’s testimony when she gave it at the state court
25 hearing or at any time during the state habeas proceedings. Moreover, there still is no word from
26 Mr. Dudek explaining the long passage of time between Ms. Shaffer’s testimony and the


1 submission of her affidavit.

2 Respondent has lodged other objections to the admission of Ms. Shaffer's
3 declaration, but the court need not reach those issues. Petitioner has failed to justify the very
4 long delay in procuring Ms. Shaffer's affidavit, and he has provided no authority that would
5 allow a witness in a state court proceeding to revise or bolster clear statements she gave
6 previously under oath. For those reasons, the motion to expand the record will be denied.

7 Accordingly, IT IS HEREBY ORDERED that the motion to expand the record
8 (Dkt. No. 36) is denied.

9 DATED: June 24, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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