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

RAVIND ROUSHAN DEO,

Petitioner,

No. CIV S-08-3145 FCD DAD P

vs.

M. MARTEL, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 11, 2009, the undersigned ordered respondent to file a response to the petition. On May 7, 2009, respondent filed a motion to dismiss the petition, arguing that petitioner had failed to exhaust all of his federal constitutional claims by presenting them first to the California Supreme Court. Petitioner has not filed an opposition to the motion.¹

¹ On June 16, 2009, the undersigned issued an order to show cause, ordering petitioner to file an opposition to respondent’s motion to dismiss within twenty days and warning petitioner that failure to do so could “be deemed a waiver of any opposition to the granting of the motion.” In response to the court’s order, petitioner filed a motion seeking clarification. On July 15, 2009, the court issued an order explaining to petitioner that respondent had filed a motion to dismiss his petition due to his alleged failure to exhaust his claims in state court and cautioning him that he was required to file an opposition to respondent’s motion within thirty days explaining why the court should not dismiss his petition. Again, petitioner has failed to file an opposition to respondent’s motion. Accordingly, dismissal pursuant to Federal Rule of Civil Procedure 41(b) would be justified.

1 **BACKGROUND**

2 On March 30, 2004, a Sacramento County Superior Court jury convicted
3 petitioner on fifty-five criminal counts (including multiple counts of forcible rape in concert,
4 attempted forcible sodomy in concert, and sexual battery) in connection with the serial gang rape
5 of six different victims. The jury also found a number of sentencing enhancement allegations to
6 be true. Pursuant to the jury’s verdict, the trial court sentenced petitioner to an aggregate
7 determinate term of 174 years in state prison plus an indeterminate term of 140 years to life in
8 state prison. On June 13, 2008, the California Court of Appeal for the Third Appellate District
9 struck the use of a firearm enhancements with respect to twelve of the counts of conviction and
10 remanded the action for resentencing on those counts but otherwise affirmed petitioner’s
11 judgment of conviction. On June 27, 2008, petitioner filed a petition for rehearing. On July 14,
12 2008, the California Court of Appeal modified its opinion in a few minor respects but otherwise
13 denied the petition for rehearing. There was no further modification of the judgment. On
14 October 1, 2008, the California Supreme Court denied review. (Pet. at 2; Resp’t’s Lodged Docs.
15 1-14.)

16 On December 23, 2008, petitioner commenced this action by filing a federal
17 petition for writ of habeas corpus setting forth six claims. Shortly thereafter, petitioner filed a
18 memorandum of points and authorities setting forth five additional claims. In total, petitioner
19 has, in one way or another, asserted the following eleven grounds for habeas relief: (1) there was
20 insufficient evidence to support his convictions with respect to victim Lori S.; (2) there was
21 insufficient evidence to support his convictions with respect to victim Chimere W.; (3) there was
22 insufficient evidence to support his convictions with respect to victim Jennifer S.; (4) there was
23 insufficient evidence to support his convictions with respect to victim Nanette S.; (5) there was
24 insufficient evidence to support his convictions with respect to victim Rebecca J.; (6) there was
25 insufficient evidence to support his convictions with respect to victim Avon T.; (7) the trial court
26 denied petitioner his right to due process when it overruled his “Kelly prong one” challenge and

1 erroneously found that the scientific community generally accepts varying thresholds for the peak
2 heights of relevant fluorescent units particularly in mixed-source DNA samples; (8) the trial
3 court denied petitioner his right to due process when it erroneously ruled that the Sacramento
4 County crime lab properly tested and interpreted the peak heights of alleles (“a Kelly prong three
5 challenge”); (9) the trial court denied petitioner his right to due process when it overruled another
6 of his “Kelly prong one challenges” and erroneously found that the scientific community
7 generally accepts STR-DNA typing of mixed forensic samples of unknown origin and number
8 and permits a known victim’s genotype to be “subtracted out” of such mixtures before
9 calculating the random match probabilities; (10) the trial court denied petitioner his right to due
10 process when it erroneously ruled that the Sacramento County crime lab properly calculated the
11 match probabilities for mixed samples (another “Kelly prong three challenge”); and (11) the trial
12 court denied petitioner his right to due process when it erroneously ruled that, in accordance with
13 “Kelly’s prong one,” the relevant scientific community generally accepts the use of unique ethnic
14 databases for determining the significance (the “probability”), of a DNA-typing “match” for
15 forensic identification. (Pet. Attach. at 1-15 & Mem. of P. & A. at 1-82.)

16 **RESPONDENT’S MOTION TO DISMISS**

17 Respondent has moved to dismiss the pending habeas petition, arguing that it is a
18 “mixed petition,” containing both exhausted and unexhausted claims. Specifically, respondent
19 argues that, although petitioner exhausted his claims challenging the use of DNA evidence, he
20 failed to present any of his claims challenging the sufficiency of evidence to the California
21 Supreme Court. Accordingly, respondent concludes that the court should dismiss the instant
22 petition due to petitioner’s failure to exhaust state court remedies. (Resp’t’s Mot. to Dismiss at
23 3-4.)

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1 ANALYSIS

2 I. Exhaustion of State Court Remedies

3 State courts must be given the first opportunity to consider and address a state
4 prisoner’s habeas corpus claims. See Rhines v. Weber, 544 U.S. 269, 273-74 (2005) (citing Rose
5 v. Lundy, 455 U.S. 509, 518-19 (1982)); King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) (“Habeas
6 petitioners have long been required to adjudicate their claims in state court - that is, ‘exhaust’
7 them - before seeking relief in federal court.”); Farmer v. Baldwin, 497 F.3d 1050, 1053 (9th Cir.
8 2007) (“This so-called ‘exhaustion requirement’ is intended to afford ‘the state courts a
9 meaningful opportunity to consider allegations of legal error’ before a federal habeas court may
10 review a prisoner’s claims.”) (quoting Vasquez v. Hillery, 474 U.S. 254, 257 (1986)). In general,
11 a federal court will not grant a state prisoner’s application for a writ of habeas corpus unless “the
12 applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. §
13 2254(b)(1). A state will not be deemed to have waived the exhaustion requirement unless the
14 state, through counsel, expressly waives the requirement. 28 U.S.C. § 2254(b)(3).

15 A petitioner satisfies the exhaustion requirement by fairly presenting to the
16 highest state court all federal claims before presenting the claims to the federal court. See
17 Baldwin v. Reese, 541 U.S. 27, 29 (2004); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v.
18 Connor, 404 U.S. 270, 276 (1971); Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008). A
19 federal claim is fairly presented if the petitioner has described the operative facts and the federal
20 legal theory upon which his claim is based. See Wooten, 540 F.3d at 1025 (“Fair presentation
21 requires that a state’s highest court has ‘a fair opportunity to consider . . . and to correct [the]
22 asserted constitutional defect.”); Lounsbury v. Thompson, 374 F.3d 785, 787 (9th Cir. 2004)
23 (same) (quoting Picard, 404 U.S. at 276)); Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003),
24 overruled on other grounds by Robbins v. Carey, 481 F.3d 1143, 1146 (9th Cir. 2007); Weaver v.
25 Thompson, 197 F.3d 359, 364 (9th Cir. 1999); see also Bland v. California Dep’t of Corrs., 20
26 F.3d 1469, 1473 (9th Cir. 1994).

1 II. Discussion

2 As noted above, petitioner has raised eleven grounds for habeas relief in his
3 filings with this court. Claims one through six relate to the alleged insufficiency of evidence
4 introduced at petitioner’s trial. Claims seven through eleven relate to alleged errors in the
5 admission of DNA evidence at his trial. After carefully reviewing petitioner’s submissions to the
6 California Supreme Court, the court finds that petitioner has failed to exhaust his first, fourth,
7 and fifth sufficiency of evidence claims because he has not fairly presented the factual or
8 legal basis for these claims to the California Supreme Court.² Accordingly, petitioner’s federal
9 habeas petition is a “mixed” petition, containing both exhausted and unexhausted claims.

10 A federal court cannot grant habeas relief based on a “mixed” petition. Typically,
11 this court would provide petitioner an opportunity to inform the court as to how he wishes to
12 proceed among several options. For example, a federal petitioner proceeding on a “mixed”
13 petition may elect to seek an order granting a stay and abeyance to allow him to return to state
14 court to exhaust his unexhausted claims, may elect to abandon his unexhausted claims and
15 proceed solely on his exhausted claims, or may move to voluntarily dismiss the action and
16 complete exhaustion of his unexhausted claims and then file a new federal petition presenting all
17 of his exhausted claims. However, in this case, petitioner has failed to file an opposition to
18 respondent’s motion to dismiss nor has petitioner responded to this court’s recent order directing

19 ² The court rejects respondent’s argument that petitioner has failed to exhaust his second
20 and sixth federal claims challenging the sufficiency of the evidence admitted at his trial. In his
21 petition for review filed with the California Supreme Court, petitioner argued in Claim IV, that
22 he “was deprived of due process of law as to his convictions on Counts 18 through 26 inclusive
23 (Chimere W.) and Counts 48 through 57 (Avon T.), inclusive, because the evidence supporting
24 those counts was insufficient as a matter of law.” (Resp’t’s Lodged Doc. 12 at 28-33.) Likewise,
25 the court concludes that petitioner exhaust his third federal claim insofar as he is claiming therein
26 that there was insufficient evidence introduced at his trial to convict him of the rape in concert of
victim Jennifer S. Again, in his petition for review filed with the California Supreme Court,
petitioner argued in Claim V, that his “rape in concert convictions are not supported by sufficient
evidence: Appellant joints in argument II of appellant Singh’s petition for review” challenging
the sufficiency of evidence supporting convictions for rape in concert as to the victim identified
as Jennifer S. (*Id.*, Doc. 12 at 34.) Accordingly, these claims presented in the petition before this
court have been properly exhausted in state court.

1 him to file a response to the motion. By failing to respond, petitioner has not indicated that he
2 wishes to proceed with this action at all. In light of the analysis set forth above, as well as the
3 circumstances of this case, the court will recommend that respondent's motion to dismiss be
4 granted, and that petitioner's "mixed" habeas corpus petition be dismissed without prejudice.³

5 **CONCLUSION**

6 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 7 1. Respondent's May 7, 2009 motion to dismiss (Doc. No. 14) be granted; and
8 2. Petitioner's application for a writ of habeas corpus be dismissed for failure to
9 exhaust state court remedies.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
15 shall be served and filed within ten days after service of the objections. The parties are advised
16 that failure to file objections within the specified time may waive the right to appeal the District
17 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: October 30, 2009.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

22 DAD:9
23 deo3145.157

24 _____
25 ³ Should petitioner file objections to these findings and recommendations and explain
26 both his failure to oppose the motion to dismiss and failure to respond to this court's order of
July 15, 2009, the undersigned will consider vacating these findings and recommendations and
determining how petitioner wishes to proceed with this action, if at all.