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

CHRISTOPHER BOYD CROCKETT,

Petitioner,

No. CIV S-09-3501 DAD P

vs.

GEORGE A. NEOTTI,

Respondent.

ORDER

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

In his habeas petition, petitioner sets forth the following two grounds for the granting of relief: (1) he sentence included a gun enhancement in violation of the principles announced in Cunningham v. California, 549 U.S. 270 (2007) and (2) he received ineffective assistance from his trial counsel. However, petitioner alleges in his petition that only the Cunningham claim has been presented to the California Supreme Court. The exhaustion of state

1 court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C.
2 § 2254(b)(1).

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 Therefore, the court will order petitioner to inform the court whether he has
2 exhausted his state court remedies concerning his ineffective assistance of counsel claim. If
3 petitioner has not exhausted state court remedies concerning this claim, he must inform the court
4 how he intends to proceed and whether he intends to file a motion for a stay and abeyance.

5 The United States Court of Appeals for the Ninth Circuit recently analyzed the
6 two procedures available to habeas petitioners who wish to proceed with exhausted and
7 unexhausted claims for relief. See King, 564 F.3d 1133. First, the Ninth Circuit explained “the
8 Kelly procedure,” which it had outlined in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). Under
9 the three-step Kelly procedure,

10 (1) the petitioner amends his petition to delete any unexhausted
11 claims, (2) the court stays and holds in abeyance the amended, fully
12 exhausted petition, allowing petitioner the opportunity to proceed
13 to state court to exhaust the deleted claims, and (3) petitioner later
14 amends his petition and re-attaches the newly-exhausted claims to
15 the original petition.

16 King, 564 F.3d at 1135. A petitioner who elects to proceed under the Kelly procedure will be
17 able to amend his petition with his newly exhausted claims if they are timely. If a petitioner’s
18 newly-exhausted claims are untimely, he will only be able to amend his petition to include them
19 if they share a “common core of operative facts” with the claims in his original petition. In this
20 regard, the Kelly procedure, unlike the alternative procedure discussed below, is a riskier one for
21 a habeas petitioner because it does not protect a petitioner’s unexhausted claims from expiring
22 during a stay. See King, 564 F.3d at 1140-41. See also Duncan v. Walker, 533 U.S. 167, 172-75
(2001) (unlike the filing of a state habeas petition, the filing of a federal habeas petition does not
23 toll the statute of limitations).

24 As the Ninth Circuit explained in King, the United States Supreme Court has
25 authorized an alternative procedure which it outlined in Rhines v. Weber, 544 U.S. 269, 277
26 (2005). Under the Rhines procedure, the petitioner need not amend his petition to delete
unexhausted claims. Instead, the petitioner may proceed on a “mixed petition,” and his

1 unexhausted claims remain pending in federal court while he returns to state court to exhaust
2 them. See King, 564 F.3d at 1140; Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines
3 concluded that a district court has discretion to stay a mixed petition to allow a petitioner time to
4 return to state court to present unexhausted claims.”). A petitioner who elects to proceed under
5 the Rhines procedure can, in many instances, avoid an issue with respect to the timeliness of his
6 petition. See King, 564 F.3d at 1140. However, the Supreme Court cautioned that a “stay and
7 abeyance [under the Rhines procedure] should be available only in limited circumstances,” and
8 “district courts should place reasonable time limits on a petitioner’s trip to state court and back.”
9 Rhines, 544 U.S. at 277-78. The Supreme Court explained that district courts should not grant a
10 stay if the petitioner has engaged in abusive litigation tactics or intentional delay or if the
11 unexhausted claims are plainly meritless. Id. at 278. In addition, federal proceedings may not be
12 stayed indefinitely and reasonable time limits must be imposed on a petitioner’s return to state
13 court to exhaust additional claims. Id. at 277-78.

14 Accordingly, IT IS HEREBY ORDERED that within twenty-one days from the
15 service of this order, petitioner shall file a response to this order and inform the court how he
16 intends to proceed as set forth above. Petitioner’s failure to comply with this order will result in
17 a recommendation that this action be dismissed without prejudice.

18 DATED: January 4, 2010.

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

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