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

DEANDRE CERRONE SCOTT,

Petitioner,

No. CIV S-10-2492 WBS GGH P

vs.

MIKE McDONALD,

Respondent.

FINDINGS AND RECOMMENDATIONS

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As set forth in the previous order, filed on February 3, 2011, petitioner challenges his 2008 conviction for first degree murder pursuant to 28 U.S.C. § 2254 on two grounds: 1) trial court error abuse of discretion when jury was given a supplemental “firecracker” instruction after the court became aware the jury was deadlocked with a hold-out juror, resulting in a coerced verdict; petitioner appears to combine that claim with one for ineffective assistance of counsel to the extent the issue may be deemed waived by his counsel’s actions/omissions; 2) trial court error in giving flight instruction where there was no substantial evidence of flight immediately after commission of crime, or the accusation of a crime having been committed. Petition, pp. 1, 7, 28-53. The court further noted that pursuant to an earlier order, filed on October 10, 2010, respondent had filed an answer on December 8, 2010, after which, instead of filing a reply/traverse, petitioner, on January 19, 2011, filed a motion for a stay. See Order, filed on

1 February 3, 2011.

2           Petitioner based his motion on having filed, in October of 2010, a habeas corpus  
3 petition in the state superior court seeking to exhaust five additional claims, which the court has  
4 numbered as 3 through 7; claim 3: insufficient evidence to support conviction/actual innocence;  
5 claim 4: prosecutorial misconduct; claim 5: ineffective assistance of trial and appellate counsel;  
6 claim 6: prosecution failed to prove every element (intent, malice aforethought, premeditation) to  
7 prove first degree murder; claim 7: prejudice by trial court abuse of discretion in permitting jury  
8 to hear misstated evidence by prosecution without sua sponte admonition. See Order, filed on  
9 February 3, 2011, citing Motion, pp. 1-2.

10           The court provided respondent an opportunity to respond before considering the  
11 motion in the February 3, 2011, order, which response, in the form of an opposition, was filed on  
12 February 15, 2011. In his motion, petitioner indicates that his state superior court habeas petition  
13 was denied on December 15, 2010, and states that his preparation for a petition to the California  
14 State Supreme Court was in process. Motion, p. 2. What petitioner does not do, however, as  
15 respondent notes, is provide any cause whatever for bringing new claims after having filed his  
16 federal petition. Opposition, p. 3. As respondent contends (Opp., p. 2), district courts may stay a  
17 habeas petition while a petitioner exhausts additional claims in state court. Rhines v. Webber,  
18 544 U.S. 269, 277, 125 S.Ct. 1528 (2005). However, the United States Supreme Court has found  
19 that a stay and abeyance of a mixed federal petition should be available only in the limited  
20 circumstance that good cause is shown for a failure to have first exhausted the claims in state  
21 court, that the claim or claims at issue potentially have merit and that there has been no  
22 indication that petitioner has been intentionally dilatory in pursuing the litigation. Rhines, supra,  
23 at 277-78, 125 S.Ct at 1535.

24           In this instance, the original petition itself is not mixed inasmuch as petitioner's  
25 two original claims were exhausted when the petition was filed, which respondent does not

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1 contest. See Answer, p. 6.<sup>1</sup> It is not clear whether petitioner had even identified the new claims  
2 at the point that he filed his federal petition. Moreover, far from showing the requisite good  
3 cause for his delay in seeking to exhaust his new claims, as respondent argues (Opp., p. 3),  
4 petitioner provides no reason at all in his motion for the delay. Respondent points to a Ninth  
5 Circuit case, wherein the Court of Appeal determined that a petitioner’s explanation for his  
6 failure to exhaust a claim arose from his being “under the impression” that his counsel had  
7 included all the issues that had been raised before the state Court of Appeal in his state Supreme  
8 Court petition. Opp., p. 2, citing Wooten v. Kirkland, 540 F.3d 1019, 1024 (9<sup>th</sup> Cir. 2008). The  
9 Wooten court stated that “[t]o accept that a petitioner’s ‘impression’ that a claim had been  
10 included in an appellate brief constitutes ‘good cause’ would render stay-and-obey orders  
11 routine.” Id. The Ninth Circuit was “mindful that AEDPA aims to encourage the finality of  
12 sentences and to encourage petitioners to exhaust their claims in state court before filing in  
13 federal court.” Id., citing Rhines, 544 U.S. at 276-77, 125 S.Ct. 1528. Therefore, to conclude  
14 that a petitioner’s lack of knowledge as to whether a claim had been exhausted could constitute  
15 “good cause” for a failure to exhaust “would conflict with the Supreme Court’s guidance in  
16 Rhines and disregard the goals of AEDPA.” Id. In holding that the district court had not abused  
17 its discretion in having concluded that Wooten did not have good cause for his failure to exhaust  
18 his cumulative error claim, the Ninth Circuit determined that the other two factors of the Rhines  
19 test need not be reached. Id., at 1023.

20 As noted, in this instance, petitioner provides no reasons at all for having failed to  
21 raise these new claims previously, falling far short of meeting the “good cause” requirement.  
22 Further, as respondent maintains, the additional claims are likely to be procedurally barred in  
23 state court as having untimely raised the claims, with citation to In re Clark, 5 Cal. 4<sup>th</sup> 750, 21  
24 Cal. Rptr.2d 509 (Cal. 1993), and/or, under Ex parte Dixon, 41 Cal.2d 756, 759, 264 P.2d 513

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26 <sup>1</sup> Per the court’s electronic pagination system.

1 (Cal. 1953), for having earlier failed to raise the issues on direct appeal. The motion to stay  
2 should be denied.

3 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s January 19,  
4 2011, motion for a stay, pending exhaustion of additional claims in state court, be denied.

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

13 DATED: 03/30/2011

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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