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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY ALTAMIRANO SERMENO,  
Petitioner,  
v.  
M.E. SPEARMAN,  
Respondent.

No. 2:14-cv-2729 DAD P

ORDER

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2012 judgment of conviction entered against him by the Butte County Superior Court.

I. Background

The facts set forth below are derived from the operative petition for writ of habeas corpus (ECF No. 1 at 1 - 38, 62 - 75), documents attached as exhibits thereto (id. at 42 - 61), and publicly-available California state court filings. The court takes judicial notice of the latter pursuant to Federal Rule of Evidence 201.

On May 15, 2012, the Butte County Superior Court entered a judgment of conviction against petitioner following his entry of plea pursuant to a plea agreement. (Id. at 1.) Petitioner pled no contest to oral copulation of an unconscious person (Cal. Penal Code § 288a) and assault with a deadly weapon (Cal. Penal Code § 245(a)(1)). He also pled no contest to the enhancement

1 allegation of having inflicted great bodily injury on the victim. California Penal Code  
2 § 12022.7(a)). See People v. Sermeno, No. C072321, 2014 WL 2528880 at \*1 (Cal. Ct. App.  
3 Jun. 5, 2014). On August 28, 2012, petitioner was sentenced to a term of 10 years in California  
4 state prison, less 437 days of presentence custody credit. (Sermeno, 2014 WL 2528880 at \*1;  
5 ECF No. 1 at 1.)

6 On October 26, 2012, petitioner filed a direct appeal of his conviction. On June 5, 2014,  
7 the California Court of Appeal for the Third Appellate District affirmed the judgment of  
8 conviction. See Sermeno, 2014 WL 2528880 at \*1. Petitioner did not file a petition for review  
9 with the California Supreme Court. (ECF No. 1 at 2.)

10 On April 23, 2013, petitioner filed a petition for writ of habeas corpus with the Butte  
11 County Superior Court. (ECF No. 1 at 3, 43.) Petitioner therein raised four grounds for habeas  
12 relief: (i) ineffective assistance of counsel based on a failure to investigate; (ii) ineffective  
13 assistance of counsel based on a fraudulently-induced plea; (iii) prosecutorial violation of Brady  
14 v. Maryland, 373 U.S. 83 (1963); and (iv) insufficient evidence to support the conviction. (Id.)  
15 On April 2, 2014, the Butte County Superior Court denied the petition. (Id.)

16 On June 2, 2014, petitioner filed a second petition for writ of habeas corpus with the Butte  
17 County Superior Court. (ECF No. 1 at 4, 46.) Petitioner therein raised one ground for habeas  
18 relief, asserting violations of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States,  
19 405 U.S. 150 (1972) by the state during his appellate and post-conviction proceedings. (Id. at 4.)  
20 On June 19, 2014, the Butte County Superior Court also denied the petition. (Id. at 46.)  
21 Petitioner then filed habeas petitions with the state appellate courts. (Id. at 5.) On August 28,  
22 2014, the California Court of Appeal for the Third Appellate District issued a summary denial of  
23 petitioner's petition for writ of habeas corpus. (ECF No. 1 at 45.) On October 8, 2014, petitioner  
24 filed a petition for writ of habeas corpus with the California Supreme Court, Case No. S221753.  
25 On December 10, 2014, the California Supreme Court denied that petition, citing the decision in  
26 People v. Duvall, 9 Cal. 4th 464, 474 (1995).

27 Meanwhile, petitioner filed two more petitions for writ of habeas corpus, dated September  
28 25, 2014 and October 1, 2014, with the Butte County Superior Court. (ECF No. 1 at 4, 50.)

1 Petitioner therein raised two grounds for habeas relief: (i) actual innocence and (ii) newly-  
2 discovered evidence. (Id.) On October 10, 2014, the Butte County Superior Court denied both of  
3 those petitions. (Id. at 52.)

4 On November 20, 2014, petitioner filed the instant petition for writ of habeas corpus with  
5 this court. Petitioner seeks federal habeas relief on the following grounds: (i) actual  
6 innocence (ECF No. 1 at 5); (ii) newly-discovered evidence (id. at 12); (iii) Brady and Giglio  
7 violations (id. at 14, 62); (iv) ineffective assistance of counsel based on a failure to investigate  
8 Brady evidence (id. at 26); and (v) ineffective assistance of counsel based on a fraudulently-  
9 induced plea (id. at 29). Petitioner also includes a sixth ground for habeas relief which, as with  
10 the fifth ground, addresses the voluntariness of his entry into his plea agreement. (Id. at 32-33).  
11 On May 11, 2015, petitioner filed a motion to supplement his federal habeas petition. (ECF  
12 No. 5.)

## 13 II. Motion to Supplement the Habeas Petition

14 In his motion to supplement the habeas petition pending before this court, petitioner  
15 includes 19 pages of new information regarding potential grounds for federal habeas relief.<sup>1</sup> (See  
16 ECF No. 5 at 3-21.) Petitioner is informed that the court cannot refer to another pleading in order  
17 to make a habeas petition complete. Local Rule 220 requires that an amended pleading be  
18 complete in and of itself without reference to any other pleading. Petitioner's motion to  
19 supplement his habeas petition will therefore be denied. Given his motion to supplement,  
20 however, it is now unclear precisely what claims and theories of federal habeas relief petitioner is  
21 actually seeking to pursue. Accordingly, the court will also dismiss the pending petition for writ  
22 of habeas corpus and grant petitioner leave to file an amended petition in which he must set forth  
23 all of his grounds for relief along with any pertinent additional information and argument in  
24 support of those claims.

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26 <sup>1</sup> Petitioner also moves the court to vacate his state court judgment of conviction pursuant to  
27 Federal Rule of Civil Procedure 60(b). Petitioner is informed that a party may bring a motion  
28 under Rule 60(b) only to obtain relief from a final judgment, order, or proceeding that issues in a  
civil proceeding in federal court. The rule has no applicability here where petitioner is  
challenging a state court conviction.

1 III. Exhaustion of State Remedies

2 The court notes that it appears that petitioner may not have fully exhausted all of his  
3 claims by presenting them to the California Supreme Court prior to filing his federal petition.

4 Generally speaking, the exhaustion of state court remedies is a prerequisite to the granting  
5 of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the  
6 exhaustion requirement by providing the highest state court with a full and fair opportunity to  
7 consider all claims before presenting them to the federal court. See Rhines v. Weber, 544 U.S.  
8 269, 273 (2005) (“[F]ederal district courts may not adjudicate mixed petitions for habeas corpus,  
9 that is, petitions containing both exhausted and unexhausted claims.”) (citing Rose v. Lundy, 455  
10 U.S. 509, 518-19 (1982)); King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) (“Habeas petitioners have  
11 long been required to adjudicate their claims in state court – that is, ‘exhaust’ them – before  
12 seeking relief in federal court.”); Farmer v. Baldwin, 497 F.3d 1050, 1053 (9th Cir. 2007) (“This  
13 so-called ‘exhaustion requirement’ is intended to afford ‘the state courts a meaningful opportunity  
14 to consider allegations of legal error’ before a federal habeas court may review a prisoner’s  
15 claims.”) (quoting Vasquez v. Hillery, 474 U.S. 254, 257 (1986)). The exhaustion requirement  
16 will not be deemed to have been waived unless the state, through counsel, expressly waives the  
17 requirement. 28 U.S.C. § 2254(b)(3).

18 The state court has an opportunity to rule on the merits of a claim when the petitioner  
19 fairly presents the claim to that court. The fair presentation requirement is met where the  
20 petitioner has described the operative facts and the federal legal theory on which the claim is  
21 based. See Picard v. Connor, 404 U.S. 270, 277-78 (1971); Wooten v. Kirkland, 540 F.3d 1019,  
22 1025 (9th Cir. 2008) (“Fair presentation requires that a state’s highest court has ‘a fair  
23 opportunity to consider . . . and to correct [the] asserted constitutional defect.’”); Lounsbury v.  
24 Thompson, 374 F.3d 785, 787 (9th Cir. 2004) (same) (quoting Picard, 404 U.S. at 276)); Kelly v.  
25 Small, 315 F.3d 1063, 1066 (9th Cir. 2003) (“Exhaustion requires the state prisoner give the state  
26 courts a ‘fair opportunity to act’ on each of his claims before he presents those claims in a federal  
27 habeas petition.”) (quoting O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999)), overruled on other  
28 grounds by Robbins v. Carey, 481 F.3d 1143, 1146 (9th Cir. 2007); Weaver v. Thompson, 197

1 F.3d 359, 364 (9th Cir. 1999) (“The state courts have been given a sufficient opportunity to hear  
2 an issue when the petitioner has presented the state court with the issue’s factual and legal  
3 basis.”). Generally, it is “not enough that all the facts necessary to support the federal claim were  
4 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.  
5 Harless, 459 U.S. 4, 6 (1982). Instead,

6 [i]f state courts are to be given the opportunity to correct alleged  
7 violations of prisoners’ federal rights, they must surely be alerted to  
8 the fact that the prisoners are asserting claims under the United  
9 States Constitution. If a habeas petitioner wishes to claim that an  
evidentiary ruling at a state court trial denied him the due process of  
law guaranteed by the Fourteenth Amendment, he must say so, not  
only in federal court, but in state court.

10 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus  
11 must include reference to a specific federal constitutional guarantee, as well as a statement of the  
12 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152 (1996).

13 In his original federal habeas petition, petitioner states that he did not appeal from the  
14 denial of his first and third state court habeas petitions all the way to the California Supreme  
15 Court. (ECF No. 1 at 5.) Thus, his original federal petition appears to contain both exhausted  
16 and unexhausted claims.<sup>2</sup>

17 It may be that petitioner requires a stay and abeyance of his federal habeas proceedings  
18 until he has fully exhausted state remedies. Petitioner is hereby advised of the following  
19 requirements for a motion for stay and abeyance. The United States Court of Appeals for the  
20 Ninth Circuit has analyzed the two procedures available to habeas petitioners who wish to  
21 proceed with both exhausted and unexhausted claims for relief in federal court. See King v.  
22 Ryan, 564 F.3d 1133 (9th Cir. 2009). First, the Ninth Circuit explained “the Kelly procedure,”  
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24 <sup>2</sup> Petitioner attempts to justify his failure to exhaust on the grounds that he “is actually innocent  
25 and it would be a miscarriage of justice not to entertain the claims.” (ECF No. 1 at 5.) Petitioner  
26 misapprehends the applicable law. While the United States Supreme Court has recognized that  
27 “the miscarriage of justice exception [may] overcome various procedural defaults,” McQuiggin v.  
28 Perkins, 569 U.S. \_\_, \_\_, 133 S. Ct 1924, 1931 (2013), a failure to comply with the exhaustion  
requirement set forth in 28 U.S.C. § 2254(b)(1) is not among the procedural defaults that may be  
so excused. A habeas petitioner must still provide the highest state court with a full and fair  
opportunity to first consider all of his claims before presenting them in federal court.

1 outlined in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). Under the three-step Kelly procedure,

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

6 King, 564 F.3d at 1135. A petitioner who elects to proceed under the Kelly procedure will be  
7 able to amend his petition with his newly exhausted claims if they are timely under the statute of  
8 limitations governing the filing of federal habeas petitions.<sup>3</sup> However, if a petitioner’s newly-  
9 exhausted claims are untimely, he will only be able to amend his petition to include them if they  
10 share a “common core of operative facts” with the claims set forth in his original federal petition.  
11 In this regard, the Kelly procedure, unlike the alternative procedure discussed below, is a riskier  
12 one for a federal habeas petitioner because it does not protect a petitioner’s unexhausted claims  
13 from expiring during a stay. See King, 564 F.3d at 1140-41; see also Duncan v. Walker, 533 U.S.  
14 167, 172-75 (2001) (unlike the filing of a state habeas petition, the filing of a federal habeas  
15 petition does not toll the statute of limitations).

16 As the Ninth Circuit explained in King, the United States Supreme Court has authorized  
17 an alternative stay and abeyance procedure which it outlined in Rhines v. Weber, 544 U.S. 269,  
18 277 (2005). Under the Rhines procedure, the petitioner need not amend his federal habeas  
19 petition to delete unexhausted claims. Instead, the petitioner may proceed on a “mixed petition,”  
20 i.e., one containing both exhausted and unexhausted claims; his unexhausted claims remain  
21 pending in federal court while he returns to state court to exhaust them. See King, 564 F.3d at  
22 1140; Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (“Rhines concluded that a district court  
23 has discretion to stay a mixed petition to allow a petitioner time to return to state court to present  
24 unexhausted claims.”). A petitioner who elects to proceed under the Rhines procedure can, in

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25 <sup>3</sup> The habeas corpus statute imposes a one year statute of limitations for filing non-capital habeas  
26 corpus petitions in federal court. In most cases, the one year period will start to run on the date  
27 on which the state court judgment became final by the conclusion of direct review or the  
28 expiration of time for seeking direct review, although the statute of limitations is tolled while a  
properly filed application for state post-conviction or other collateral review is pending. 28  
U.S.C. § 2244(d).

1 many instances, avoid an issue with respect to the timeliness of the claims set forth in his federal  
2 petition. See King, 564 F.3d at 1140. However, the Supreme Court has also cautioned that a  
3 “stay and abeyance [under the Rhines procedure] should be available only in limited  
4 circumstances,” and “district courts should place reasonable time limits on a petitioner’s trip to  
5 state court and back.” Rhines, 544 U.S. at 277-78. The Supreme Court explained that district  
6 courts should not grant such a stay if the petitioner has engaged in abusive litigation tactics or  
7 intentional delay or if the unexhausted claims are plainly meritless. Id. at 278. Further, under  
8 Rhines, ““stay-and-abeyance is only appropriate when the district court determines there was  
9 good cause for the petitioner’s failure to exhaust his claims first in state court.”” King, 564 F.3d  
10 at 1139 (quoting Rhines, 544 U.S. at 277-78). The decisions in both Kelly and Rhines “are  
11 directed at solving the same problem – namely, the interplay between AEDPA’s one-year statute  
12 of limitations and the total exhaustion requirement first articulated in Rose v. Lundy, 455 U.S.  
13 509 (1982).” King, 564 F.3d at 1136.

14 Finally, petitioner is cautioned that if he chooses to proceed on an amended petition  
15 raising only exhausted claims and does not move for a stay, he risks forfeiting consideration of  
16 the unexhausted claims in this or any other federal court. See McCleskey v. Zant, 499 U.S. 467  
17 (1991); see also Rose, 455 U.S. at 520-21; Rule 9(b), 28 U.S.C. foll. § 2254.

#### 18 IV. Request to Proceed In Forma Pauperis

19 Petitioner has also filed an application to proceed in forma pauperis.<sup>4</sup>

20 Examination of the in forma pauperis application reveals that petitioner is unable to afford  
21 the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See  
22 28 U.S.C. § 1915(a).

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25 <sup>4</sup> Petitioner mistakenly attached an application to proceed in forma pauperis to his initial petition  
26 for grant of habeas corpus. (See ECF No. 1 at 39-40.) Petitioner separately filed the signed  
27 certificate portion of the application, and a certified copy of his prison trust account statement for  
28 the six month period immediately preceding the filing of the complaint. (See ECF No. 2.)  
Considered together, these filings comprise a properly-completed application to proceed in forma  
pauperis.

1 V. Motion for Appointment of Counsel

2 Petitioner has requested the appointment of counsel. There currently exists no absolute  
3 right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460  
4 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage  
5 of the case “if the interests of justice so require.” See Rule 8(c), 28 U.S.C. foll. § 2254. In the  
6 present case, the court does not find that the interests of justice would be served by the  
7 appointment of counsel at the present time.

8 VI. Conclusion

9 In accordance with the foregoing, IT IS HEREBY ORDERED that:

10 1. Petitioner’s petition for a writ of habeas corpus (ECF No. 1) is dismissed.

11 2. Within thirty days of the date of service of this order, petitioner shall do one of the  
12 following:

13 (a) file an amended petition that contains all of his exhausted and unexhausted  
14 claims, together with a motion for a stay and abeyance with sufficient facts and information to  
15 satisfy the requirements of Rhines, or

16 (b) file an amended habeas petition in this court containing only exhausted claims,  
17 together with a motion for a stay indicating that he wishes to proceed under the Kelly stay  
18 procedure, or

19 (c) file an amended habeas petition in this court containing solely exhausted  
20 claims, thereby forfeiting consideration of his unexhausted claims.

21 Any amended petition must bear the case number assigned to this action and the title “Amended  
22 Petition.” Failure to comply with this order will result in a recommendation that this action be  
23 dismissed without prejudice.

24 3. The Clerk of the Court is directed to send petitioner a blank form used by prisoners in  
25 this district to petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

26 4. Petitioner’s motion to proceed in forma pauperis (ECF No. 2) is granted.

27 5. Petitioner’s January 9, 2015 and May 11, 2015 motions for appointment of counsel  
28 (ECF Nos. 4, 6) are denied without prejudice to their renewal at a later stage of the proceedings.



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6. Petitioner's motion to supplement the habeas petition and vacate the state court judgment of conviction (ECF No. 5) is denied.

Dated: August 14, 2015

  
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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

DAD:10  
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