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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JERMAINE ANTHONY GIVENS,

No. C 09-3742 SI (pr)

Petitioner,

**ORDER TO SHOW CAUSE AND  
DENYING REQUESTED STAY**

v.

MICHAEL McDONALD, warden,

Respondent.

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**INTRODUCTION**

Jermaine Anthony Givens, an inmate at the High Desert State Prison, filed this pro se action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Several months ago, the court reviewed the petition and issued an Order On Initial Review that (1) required Givens to file an amended petition that identified the federal constitutional basis for each of his claims and provided a short but adequate statement of facts showing the alleged constitutional violation, and (2) described an exhaustion problem for Claims 1, 4 and 5 that Givens needed to address. Givens then filed a motion for a stay, a second request for appointment of counsel, and an amended petition. For the reasons discussed below, the court will deny the motions for a stay and for appointment of counsel, and will issue an order to show cause on several exhausted claims in the amended petition.

United States District Court  
For the Northern District of California

1 **BACKGROUND**

2 Givens states in his amended petition that he was convicted in Alameda County Superior  
3 Court of murder and attempted murder. In 2006, he was sentenced to life without the possibility  
4 of parole plus 25 years to life in prison. He appealed. His conviction was affirmed by the  
5 California Court of Appeal and his petition for review was denied by the California Supreme  
6 Court in 2008. Givens reports that he did not file any state habeas petitions before filing this  
7 action.

8  
9 **DISCUSSION**

10 A. Motion For Stay

11 The court earlier noted that state court remedies had not been exhausted for three claims  
12 and instructed Givens to deal with that problem by dismissing the unexhausted claims,  
13 dismissing the whole action, or filing a motion for a stay. Order On Initial Review, pp. 3-5. The  
14 court also provided information about the requirements for obtaining a stay. See id. at 4-5.  
15 Givens chose to move for a stay of this action so he could exhaust state court remedies for his  
16 unexhausted claims.

17 Givens' motion for a stay is DENIED. (Docket # 10.) He has not shown good cause for  
18 his failure to exhaust his claims first in state court, as is necessary to obtain a stay under Rhines  
19 v. Weber, 544 U.S. 269, 277 (2005). He argues that the reason he seeks a stay is because he was  
20 informed after his appeal "by Appellate attorney that a rehearing in the court was of no use (see  
21 attached attorney correspondences)." Motion, p. 1. However, the exhibits to the motion show  
22 that Givens was informed long before his direct appeal concluded that appellate counsel did not  
23 intend to file a motion for rehearing. In a January 29, 2008 letter from attorney McCabe to Betty  
24 Williams (Givens' grandmother), with a copy sent to Givens, counsel explained why he chose  
25 not to file a petition for rehearing in the California Court of Appeal. It was after that letter was  
26 sent that Givens' petition was filed in the California Supreme Court (on February 26, 2008), and  
27 even longer after that letter was sent that the petition was denied (on May 14, 2008, according  
28 to the docket sheet for People v. Givens, Cal. S. Ct. No. S161183, on the California courts

1 website). The sequence of events makes Givens' purported reason for his delay unpersuasive.  
2 That is, although he urges to the contrary, he was made aware that appellate counsel would not  
3 seek a rehearing months before his direct appeal concluded. He did not file his federal petition  
4 until August 2009 – about twenty months after he became aware of the petition for rehearing  
5 facts, and about fifteen months after the California Supreme Court denied review. He has not  
6 shown good cause for his failure to exhaust state court remedies in the many months before he  
7 filed his federal petition. See Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008)  
8 (upholding denial of stay because petitioner's incorrect "impression" that counsel had raised  
9 claims to the California Supreme Court on direct appeal did not establish good cause under  
10 Rhines for failure to exhaust claims earlier).

11 There is an alternative method to deal with a petitioner who has some unexhausted claims  
12 he wants to present in his federal habeas action, but it wouldn't help Givens. Under the  
13 procedure outlined in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), "(1) a petitioner amends  
14 his petition to delete any unexhausted claims; (2) the court stays and holds in abeyance the  
15 amended, fully exhausted petition, allowing the petitioner the opportunity to proceed to state  
16 court to exhaust the deleted claims; and (3) the petitioner later amends his petition and  
17 re-attaches the newly-exhausted claims to the original petition." King v. Ryan, 564 F.3d 1133,  
18 1134 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1070-71). A petitioner seeking to avail himself  
19 of the Kelly three-step procedure is not required to show good cause as under Rhines, but rather  
20 must show that the amendment of any newly exhausted claims back into the petition satisfies  
21 both Mayle v. Felix, 545 U.S. 644, 655 (2005), by sharing a "common core of operative facts"  
22 and Duncan v. Walker, 533 U.S. 167 (2001), by complying with the statute of limitations. Id.  
23 at 1141-43.

24 Even if Givens wanted to file a motion to amend to delete the unexhausted claims and to  
25 stay the action, the three claims Givens wants to exhaust and add by further amendment would  
26 not relate back to the properly exhausted claims in the original petition. The unexhausted claims  
27 are about the alleged "unreasonable search, seizure, detention and coercion/Miranda violation,"  
28 Amended Petition, p. 6 (Claim 1); improper admission of taped conversations between his

1 mother and grandmother (Claim 4), and exclusion of African-Americans from the jury and a  
2 sleeping juror (Claim 5) None of them share a common core of operative facts with any of the  
3 properly exhausted claims contained in the original petition. See, e.g., Rhoades v. Henry  
4 (Haddon), 598 F.3d 511, 519-20 (9th Cir. 2010) (denial of leave to amend petition to add claims  
5 arising out of alleged misconduct of the prosecutors in another case against defendant based on  
6 FBI lab testing was proper because those claims did not relate back to other timely-filed claims  
7 about police questioning at the time of his arrest, jailhouse informant testimony, and judicial  
8 bias); Hebner v. McGrath, 543 F.3d 1133, 1138-39 (9th Cir. 2008) (no error in denying  
9 petitioner leave to amend petition to add new claim that would be untimely where new claim  
10 arose from different core of operative facts than claims in original petition and thus did not relate  
11 back to original petition). The three unexhausted claims would not relate back to the properly  
12 exhausted claims contained in the original petition that was filed on or about the last day of the  
13 one-year statute of limitations period, 28 U.S.C. § 2244(d).<sup>1</sup>

14  
15 **B. Review Of Amended Petition**

16 This court may entertain a petition for writ of habeas corpus "in behalf of a person in  
17 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
18 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A  
19 district court considering an application for a writ of habeas corpus shall "award the writ or issue  
20 an order directing the respondent to show cause why the writ should not be granted, unless it  
21 appears from the application that the applicant or person detained is not entitled thereto." 28  
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23 <sup>1</sup>If Givens wants to file a motion under King/Kelly to further amend his amended petition (to  
24 delete unexhausted claims) and to stay this action while he exhausts state court remedies for those  
25 unexhausted claims, he may do so within **thirty days** of the date of this order. He is cautioned,  
26 however, that when he tries to later add those claims back into a further amendment, they likely will be  
dismissed as untimely under the one-year habeas statute of limitations, 28 U.S.C. § 2244(d), because  
they do not relate back to the original petition.

27 In the unlikely event that Givens would prefer to dismiss the entire action, rather than proceed  
28 with only the exhausted claims, he may file a request for voluntary dismissal within **thirty days** of the  
date of this order. He is cautioned, however, that if he dismisses this action it is quite likely that any  
later-filed action would be dismissed as untimely under 28 U.S.C. § 2244(d). That is, if he dismisses  
this action, he may lose forever his right to federal habeas review of his conviction.

1 U.S.C. § 2243.

2 Givens alleges several claims in his amended petition. In claim 1, he alleges that he was  
3 subjected to an "unreasonable search, seizure, detention and coercion/Miranda violation."  
4 Amended Petition, p. 6. In Claim 2, he contends he received ineffective assistance of counsel  
5 in that counsel: did an inadequate investigation; did not interview or call several witnesses;  
6 failed to object to the admission of the rifle evidence; failed to object to some prosecution  
7 witnesses' testimony, and failed to communicate with his client. In Claim 3, Givens contends  
8 the prosecutor engaged in misconduct in that he subpoenaed two witnesses he did not intend to  
9 call, expressed his personal belief about sergeant Longmire, and made improper comments in  
10 closing argument. In Claim 4, Givens contends that his right to due process was violated by the  
11 use of recording that were not authenticated. In Claim 5, Givens contends that all African-  
12 American and other minorities were dismissed from the jury, and that one remaining juror slept  
13 during trial. In Claim 6, Givens contends that his sentencing was improper because the  
14 sentencing court relied on factors not found true beyond a reasonable doubt by a jury. He has  
15 adequately identified the federal constitutional basis for each of his claims. Liberally construed,  
16 the claims are cognizable in a federal habeas action.

17 Givens' amended petition has the same exhaustion problem the court identified in his  
18 original petition: state court remedies have not been exhausted for Claims 1, 4 and 5. In light  
19 of the denial of the motion for a stay discussed in the preceding section, the court now dismisses  
20 those unexhausted claims. See Rose v. Lundy, 455 U.S. 509, 522 (1982); 28 U.S.C. § 2254(b).

## 22 CONCLUSION

23 For the foregoing reasons,

24 1. Claims 2, 3, and 6 in the amended petition appear to be cognizable claims for  
25 habeas relief and warrants a response. The unexhausted claims (i.e., Claims 1, 4, and 5) are  
26 dismissed.

27 2. The clerk shall serve by certified mail a copy of this order, the amended petition  
28 and all attachments thereto upon respondent and respondent's attorney, the Attorney General of

1 the State of California. The clerk shall also serve a copy of this order on petitioner.

2 3. Respondent must file and serve upon petitioner, on or before **September 10, 2010**,  
3 an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases,  
4 showing cause why a writ of habeas corpus should not be issued. Respondent must file with the  
5 answer a copy of all portions of the court proceedings that have been previously transcribed and  
6 that are relevant to a determination of the issues presented by the amended petition.

7 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse  
8 with the court and serving it on respondent on or before **October 15, 2010**.

9 5. Petitioner is responsible for prosecuting this case. Plaintiff must promptly keep  
10 the court informed of any change of address and must comply with the court's orders in a timely  
11 fashion.

12 6. Petitioner is cautioned that he must include the case name and case number for this  
13 case on any document he submits to this court for consideration in this case.

14 7. Petitioner's motion to stay is DENIED. (Docket # 10.)

15 8. Petitioner's second motion for appointment of counsel is DENIED for reasons  
16 stated in the denial of his first motion for appointment of counsel. (Docket # 11.)

17 IT IS SO ORDERED.

18 DATED: July 13, 2010

  
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SUSAN ILLSTON  
United States District Judge

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