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7 SANTOS F. ASCENCIO,

Petitioner,

No. C 13-3433 PJH (PR)

9 | VS.

ORDER FOR RESPONDENT TO SHOW CAUSE

10 M.E. SPEARMEN,

Respondent.

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Petitioner, a state prisoner has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted in Alameda County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d). The amended petition was dismissed with leave to amend and petitioner has filed a second amended petition.

BACKGROUND

18 A jury convicted petitioner of two counts of forcible rape in concert. He was
19 sentenced to fourteen years in prison. Petitioner states that he appealed to the court of
20 appeals and state supreme court, but those appeals were denied. He states no other
appeals or habeas petitions were filed.

DISCUSSION

A. Standard of Review

24 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
25 custody pursuant to the judgment of a State court only on the ground that he is in custody
26 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
27 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet
28 heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An
application for a federal writ of habeas corpus filed by a prisoner who is in state custody

1 pursuant to a judgment of a state court must “specify all the grounds for relief available to
2 the petitioner … [and] state the facts supporting each ground.” Rule 2(c) of the Rules
3 Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not sufficient, for the
4 petition is expected to state facts that point to a ‘real possibility of constitutional error.’”
5 Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir.
6 1970)). “Habeas petitions which appear on their face to be legally insufficient are subject
7 to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102,
8 1108 (9th Cir. 1996) (Schroeder, J., concurring).

9 **B. Legal Claims**

10 As grounds for federal habeas relief, petitioner asserts: (1) the victim’s abortion
11 records were improperly admitted in violation of the confrontation clause and *Crawford v.*
12 *Washington*, 541 U.S. 36 (2004); (2) the judge erred in not instructing the jury on lesser
13 included offenses; and (3) with no direct testimony as to his culpability, he is actually
14 innocent of the rape and assault.

15 Before he may challenge either the fact or length of his confinement in a habeas
16 petition in this court, petitioner must present to the California Supreme Court any claims he
17 wishes to raise in this court. See *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding every
18 claim raised in federal habeas petition must be exhausted). The general rule is that a
19 federal district court must dismiss a federal habeas petition containing any claim as to
20 which state remedies have not been exhausted. *Id.* When faced with a post-AEDPA mixed
21 petition, the district court must sua sponte inform the habeas petitioner of the mixed petition
22 deficiency and provide him an opportunity to amend the mixed petition by striking
23 unexhausted claims as an alternative to suffering dismissal before the court may dismiss
24 the petition. *Jefferson v. Budge*, 419 F.3d 1013, 1016 (9th Cir. 2005) (citing *Rhines v.*
25 *Weber*, 544 U.S. 269, 277 (2005)) (court’s erroneous dismissal of mixed petition entitled
26 petitioner to equitable tolling of one-year AEDPA statute of limitations from the date the first
27 habeas petition was dismissed until the date the second habeas petition was filed).

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1 The first two claims were properly exhausted and liberally construed are sufficient to
2 require a response. However, the original and amended petitions were dismissed with
3 leave to amend as they contained both exhausted and unexhausted claims. Petitioner was
4 informed that the third claim regarding actual innocence was not presented to the state
5 courts and could not be considered until it was exhausted. Petitioner was repeatedly
6 advised to only present exhausted claims or file a motion to stay.

7 In this second amended petition, petitioner has again failed to follow court
8 instructions. Petitioner has again included the third unexhausted claim but has not sought
9 a motion to stay. As petitioner was twice informed of the deficiencies of the petition, this
10 claim will be stricken and the petition will continue on the first two claims. Moreover,
11 petitioner provides no support or explanation for this unexhausted claim and does not
12 allege there is new evidence that demonstrates his innocence.¹

CONCLUSION

14 1. Claim three from the second amended petition is stricken and the petition will
15 continue on the first two claims.

16 2. The clerk shall serve by regular mail a copy of this order and the second
17 amended petition and all attachments thereto on respondent and respondent's attorney, the
18 Attorney General of the State of California. The clerk also shall serve a copy of this order
19 on petitioner.

20 3. Respondent shall file with the court and serve on petitioner, within sixty days of
21 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
22 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
23 granted. Respondent shall file with the answer and serve on petitioner a copy of all
24 portions of the state trial record that have been transcribed previously and that are relevant

¹ The United States Supreme Court has never held that a freestanding claim of actual innocence is cognizable on federal habeas review. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”); see also *House v. Bell*, 547 U.S. 518, 545–55 (2006) (declining “to answer the question left open in *Herrera*” of whether “freestanding innocence claims are possible”).

1 to a determination of the issues presented by the petition.

2 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
3 the court and serving it on respondent within thirty days of his receipt of the answer.

4 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an
5 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
6 Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the
7 date this order is entered. If a motion is filed, petitioner shall file with the court and serve
8 on respondent an opposition or statement of non-opposition within twenty-eight (28) days of
9 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
10 within fourteen days of receipt of any opposition.

11 5. Petitioner is reminded that all communications with the court must be served on
12 respondent by mailing a true copy of the document to respondent's counsel. Petitioner
13 must keep the court informed of any change of address and must comply with the court's
14 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
15 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*
16 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

17 **IT IS SO ORDERED.**

18 Dated: October 15, 2013.


PHYLLIS J. HAMILTON
United States District Judge

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