

E-FILED on 11/13/2008IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANTIONE SMITH,

Petitioner,

v.

RICHARD KIRKLAND, Warden,

Respondent.

No. C-05-05168 RMW

ORDER TO AMEND PETITION

[Re Docket Nos. 1 and 12]

Antione Smith must amend his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 if he wishes to proceed with any newly exhausted claims.

Petitioner was convicted of first-degree murder in the Alameda Superior Court, and his conviction was affirmed by the Court of Appeal. *See People v. Smith*, A102068 (Cal. App. Jul. 8, 2004). The California Supreme Court denied his petition for review.

On December 13, 2005, petitioner, represented by counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 11, 2006, petitioner, through counsel, filed a document titled "Citation of New Authority" bringing to the court's attention *Holmes v. South Carolina*, 547 U.S. 319 (2006). *See* Docket No. 4.

1 In February 2007, petitioner, acting on his own, submitted a motion for leave to file a *pro se*
2 supplemental brief or amended habeas, claiming that his appellate counsel refused to raise issues he
3 considered to be pertinent to his petition for habeas relief. Petitioner also asked the court to stay
4 proceedings so that he could exhaust in the state court the claims his appellate counsel was unwilling
5 to raise, as well as a claim for ineffective assistance of counsel. See Docket No. 6.

6 By order dated August 28, 2007, the court granted petitioner's request, granting him leave to
7 file *pro se* briefing and holding the case in abeyance while he exhausted his state court claims. See
8 Docket No. 10. The court gave petitioner 30 days to file *pro se* briefing and ordered petitioner to
9 clarify whether he will be represented by counsel or representing himself in this case. *Id.* The court
10 has since received a letter from petitioner stating that the California Supreme Court has denied his
11 state habeas petition. See Docket No. 12. This court, however, did not clearly inform petitioner that
12 after the California Supreme Court denied his petition, he needed to amend his federal petition to
13 assert any newly exhausted claim. Accordingly, petitioner is now advised and ordered to file any
14 amended petition within 30 days of this order.

15 Petitioner advised on September 24, 2007 that he would be represented by counsel.
16 However, no counsel has appeared since that date. Original counsel is advised that he still appears of
17 record and thus has responsibility to the court and his client of record absent substitution.

18 The court orders as follows:

- 19 1. The clerk shall serve by mail a copy of this order upon petitioner, petitioner's counsel
20 of record, respondent and the respondent's attorney, the Attorney General of the State
21 of California.
- 22 2. The court will then review the amended petition asserting any newly exhausted
23 claims and determine whether an order to show cause will issue.
- 24 3. Petitioner and his counsel of record are to file within 30 days the appropriate papers
25 to clarify petitioner's representation.

26 DATED: 11/10/2008



RONALD M. WHYTE
United States District Judge

1 **Notice of this document has been sent to:**

2 **Petitioner:**

Antoine Smith
T-88061
P.O. Box. 7500
Pelican Bay State Prison
Crescent City, CA 95532

5 **Counsel for Petitioner:**

6 Walter Pyle walt@wfkplaw.com

7 **Counsel for Respondent:**

8 (No appearance)

9
10 Counsel are responsible for distributing copies of this document to co-counsel that have not
11 registered for e-filing under the court's CM/ECF program.

12 **Dated:** 11/13/2008

TSF