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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KHALED MOHAMED,

Plaintiff,

v.

HEIDI M. LACKNER, Warden,

Defendant.

CASE NO. 15cv267-GPC(KSC)

**ORDER GRANTING
PETITIONER'S MOTION TO
EXPAND THE RECORD**

[Dkt. No. 29.]

On June 5, 2017, Petitioner filed a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases. (Dkt. No. 29.) Respondent has not filed an opposition. Based on the reasoning below, the Court GRANTS Petitioner's motion to expand the record.

Discussion

On February 9, 2015, Petitioner Khaled Mohamed ("Petitioner") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with counsel. (Dkt. No. 1.) In 2011, a jury convicted Mohamed of possession of methamphetamine for sale; transportation of methamphetamine for sale between two noncontiguous countries; conspiracy to sell methamphetamine; conspiracy to possess methamphetamine for sale; and conspiracy to transport methamphetamine for sale. (Dkt. No. 12-10 at 362.) The jury also found he used a false compartment to transport methamphetamines and the quantity of methamphetamine exceeded 10 kilograms. (Id.) Mohamed was sentenced

1 to 16 years in prison. (Id. at 363.)

2 The petition alleges the following claims: (1) violation of his Sixth Amendment
3 right to counsel when the trial court denied his request to discharge retained counsel
4 prior to trial; (2) ineffective assistance of appellate counsel and denial of due process
5 because the court of appeal's did not order production of the free talk, which
6 purportedly contained Brady material and revealed a conflict of interest; (3) denial of
7 the Sixth Amendment right to counsel because the free talk revealed that his trial
8 counsel had a conflict of interest; (4) Brady violation because the prosecution withheld
9 the free talk from the defense; and (5) ineffective assistance of trial counsel because
10 trial counsel did not use the free talk or call Lisa as a witness during trial precluding
11 evidence that Petitioner was innocent and/or deserved a lesser punishment. (Dkt. No.
12 1 at 6-13.)

13 Central to Mohamed's petition is a "free talk" that occurred between Lisa,
14 Mohamed's girlfriend at the time, and the district attorney prosecuting Mohamed's
15 case. The prosecution successfully claimed privilege and the state court sealed the
16 "free talk" pursuant to California Evidence Code section 1040.

17 The superior court held an evidentiary hearing after the court of appeal issued
18 an order to show cause directing the superior court to hold an evidentiary hearing to
19 review the contents of the "free talk" in order to resolve issues raised in Petitioner's
20 state habeas petition. After the evidentiary hearing, the superior court denied the
21 petition for writ of habeas corpus and discharged the OSC. (Dkt. No. 12-10 at 361-67.)
22 In another habeas petition where Petitioner challenged the trial court's findings at the
23 OSC evidentiary hearing, the court of appeal denied his petition without reviewing the
24 transcript of the "free talk" and relied on the superior court's assessment of Lisa's
25 comments during the "free talk." (Dkt. No. 12-11 at 359.)

26 In his motion, Petitioner seeks to expand the record for the Court to review the
27 sealed transcripts of the "free talk" conducted by Deputy District Attorney Tag and
28

1 Lisa, and an *in-camera* hearing¹ with Deputy District Attorney Tag and state court
2 Judge Bloom “where questions were propounded to Tag by defense counsel” that the
3 court of appeal did not review.² (Dkt. No. 29 at 1.) He claims these transcripts were
4 never reviewed by the court of appeal and it improperly relied on the conclusions of
5 the superior court judge at the order to show cause hearing. (Dkt. No. 29 at 4.)

6 Rule 7 of the Rules Governing Section 2254 Cases states that a judge “may
7 direct the parties to expand the record by submitting additional materials relating to the
8 petition.” Such materials include, without limitation, “letters predating the filing of the
9 petition, documents, exhibits, and answers under oath to written interrogatories
10 propounded by the judge.” *Id.* “The purpose [of the rule] is to enable the judge to
11 dispose of some habeas petitions not dismissed on the pleadings, without the time and
12 expense required for an evidentiary hearing.” *Id.* advisory committee’s note on 1976
13 adoption. In Holland, the United States Supreme Court held that new evidence may
14 be considered in a federal habeas corpus proceeding only when the failure to develop
15 the facts in state court are not the petitioner’s fault, or when the requirements of 28
16 U.S.C. § 2254(e)(2)³ are satisfied. Holland v. Jackson, 542 U.S. 649, 652-53 (2004).

18 ¹Petitioner does not specify but it appears that he is referencing the *in camera*
19 hearing between the Court and Deputy District Attorneys Tag and Atkins held on
20 August 12, 2013 concerning the assertion of privilege of the “free talk.” (Dkt. No. 12-
10 at 315-16.)

21 ²The Court also notes that in the traverse, Petitioner asserted that the Court
22 should review the transcripts of the “free talk” and the *in camera* hearing as they are
23 not part of the record before the Court. (Dkt. No. 16-1 at 22.)

24 ³28 U.S.C. 2254(e)(2) provides,

25 (2)If the applicant has failed to develop the factual basis of a claim in State court
26 proceedings, the court shall not hold an evidentiary hearing on the claim unless
27 the applicant shows that--

28 (A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral
review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through
the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and
convincing evidence that but for constitutional error, no reasonable factfinder
would have found the applicant guilty of the underlying offense.

1 Here, Petitioner has unsuccessfully sought the production of the sealed “free
2 talk” transcript and has consistently argued in his state habeas petitions that the court
3 of appeal erred by not reviewing the sealed transcript of the “free talk.” Therefore, the
4 failure to develop the record was not Petitioner’s fault.

5 In his motion, Petitioner cites to the recent Ninth Circuit case of Nasby v.
6 McDaniel, 853 F.3d 1049 (9th Cir. 2017), where the Ninth Circuit vacated the district
7 court’s dismissal of the petition and remanded the case to consider the petition after
8 obtaining and reviewing all relevant portions of the state court record. Id. at 1055. In
9 Nasby, the district court did not consider any of the state court records including the
10 trial transcript and the transcript of the evidentiary hearing held by the state court
11 which were relevant to deciding Petitioner’s claim. Id. at 1053. Instead, the district
12 court relied on the facts as described in the Supreme Court’s opinion denying relief.
13 Id. at 1052. In remanding the case back to the district court, the court explained that
14 in order for there to be meaningful collateral review, the district court must
15 independently review the basis for the state court’s decision. Id. at 1052-53 (citing
16 Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997)). The court explained that federal
17 habeas courts must “examine independently the basis for the state court’s decision,
18 rather than to accept the state court’s determination of the facts on faith.” Id. at 1053.

19 Here, in one of his claims, Petitioner argues that the state appellate court erred
20 by failing to review the transcript of the “free talk” and relied solely on the trial court’s
21 review of the contents of the “free talk.” Moreover, all the claims in the Petition
22 originate from the contents of the “free talk.” Therefore, if Petitioner’s allegations are
23 true, he may be entitled to habeas relief. In order to conduct a meaningful collateral
24 review, the Court must independently consider all relevant state court records,
25 including the transcripts of the “free talk” and *in-camera* hearing concerning the
26 privilege issue that relate to certain claims in his petition.


27 Accordingly, the Court GRANTS Petitioner’s motion to expand the record
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1 pursuant to Rule 7 of the Rules Governing Section 2254 Cases. Respondent is directed
2 to submit a lodged copy of the sealed “free talk” transcript and/or audio recording, and
3 the sealed in-camera hearing transcript to the chambers of the undersigned judge for
4 an in-camera review on or before August 11, 2017.

5 IT IS SO ORDERED.

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DATED: July 21, 2017


HON. GONZALO P. CURIEL
United States District Judge