

2:13-cv-02357-JAD-GWF

Order
[##12, 26, 29]

Procedural History

On September 23, 2010, Jones filed a post-conviction petition for writ of habeas corpus in state court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 106. The state district court held an evidentiary hearing on May 11, 2012 (*see* Reporter’s Transcript, Exhibit 121), entertained oral argument on October 22, 2012 (*see* Reporter’s Transcript, Exhibit 129), and denied

1 the petition in a written order on November 13, 2012. *See* Findings of Fact, Conclusions of Law and
2 Order, Exhibit 137. Jones appealed, and the Nevada Supreme Court affirmed on October 16, 2013.
3 *See* Order of Affirmance, Exhibit 158.

4 On March 4, 2014, Jones filed a second post-conviction petition for writ of habeas corpus in
5 state court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 164. On July 8,
6 2014, the state district court denied that petition on procedural grounds. *See* Findings of Fact,
7 Conclusions of Law, and Order, Exhibit 187. Jones appealed, and the Nevada Supreme Court
8 affirmed on November 13, 2014. *See* Order of Affirmance, Exhibit 194.

9 This court received Jones's federal habeas petition, initiating this action *pro se*, on
10 December 30, 2013 (Doc. 1). Jones filed an amended habeas petition on September 3, 2014
11 (Doc. 7). Jones's amended habeas petition asserts ten grounds for relief.

12 On January 16, 2015, respondents filed a motion to dismiss (Doc. 12), arguing that Grounds
13 2, 3, 4, 6, 9, and 10 of Jones's amended petition are unexhausted in state court, and that Grounds 2,
14 3, 7, and 9 should be dismissed because they are conclusory. Jones filed an opposition to the motion
15 to dismiss on March 16, 2015 (Doc. 23), and respondents filed a reply in support of their motion to
16 dismiss on March 23, 2015 (Doc. 24).

17 On April 8, 2015, Jones filed a response to the respondents' reply in support of their motion
18 to dismiss (Doc. 25), informing the court of difficulties he had at the prison where he is incarcerated
19 responding to the motion to dismiss. On April 21, 2015, Jones filed a further response to the
20 respondents' reply (Doc. 28).

21 Respondents filed motions to strike the documents filed by Jones on April 8 and 21, 2015
22 (Docs. 26, 29), arguing that those filings were not authorized by the court's local rules. Jones filed
23 responses to the two motions to strike (Docs. 30, 31). Respondents are correct that a response to a
24 reply is generally not authorized. Given that Jones appears *pro se*, however, and because of the
25 nature of the assertions in his April 8, 2015, filing, the court will deny the motions to strike and
26 consider the information in the documents Jones filed on April 8 and 21, 2015.

27 **Discussion**

28 A federal court may not grant habeas corpus relief on a claim not exhausted in state court.

1 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity and is
2 intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*
3 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the
4 claim to the highest state court and must give that court the opportunity to address and resolve it.
5 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
6 10 (1992). A claim is fairly presented to the state’s highest court if the petitioner describes to that
7 court the operative facts and legal theory upon which the claim is based. *See Anderson v. Harless*,
8 459 U.S. 4, 6 (1982) (*per curiam*); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d 859, 862
9 (9th Cir. 1982).

10 In this case, Jones’s exhaustion of claims in state court is controlled by the claims that Jones
11 asserted on his direct appeal (*see* Appellant’s Opening Brief, Exhibit 81; Appellant’s Reply Brief,
12 Exhibit 90), on the appeal in his first state habeas action (*see* Fast Track Statement, Exhibit 149;
13 Reply to the Fast Track Response, Exhibit 157), and in his second state habeas action (*see* Petition
14 for Writ of Habeas Corpus (Post-Conviction), Exhibit 164).

15 **A. Ground 2**

16 In Ground 2 of his amended habeas petition, Jones claims “The district court abused its
17 discretion when it denied my post conviction habeas petition by finding that [his] lawyer was not
18 ineffective for failing to view the videotape of the Sept. 19, 2007[,] robbery.” *See* Amended Petition
19 (Doc. 7) at 5. This claim is unexhausted. In his appeals before the Nevada Supreme Court, Jones
20 did not assert that the state district court violated his federal constitutional rights in this manner. *See*
21 Appellant’s Opening Brief, Exhibit 81; Appellant’s Reply Brief, Exhibit 90; Fast Track Statement,
22 Exhibit 149; Reply to the Fast Track Response, Exhibit 157. Liberally construing Jones’s *pro se*
23 petition, the court could read Ground 2 as setting forth the underlying claim of ineffective assistance
24 of trial counsel—the claim that Jones’s trial counsel was ineffective for not viewing the videotape.
25 However, that claim appears in Ground 6 (*see* Amended Petition at 13). Therefore, it is unnecessary
26 to so construe Ground 2; doing so would only result in a redundant claim. Ground 2 is unexhausted.

27 **B. Ground 3**

28 In Ground 3, Jones claims that his Fourteenth Amendment right to due process of law was

1 violated because the state lost or destroyed the videotape evidence concerning the September 19,
2 2007, robbery. *See* Amended Petition at 7. Jones raised the claim on the appeal in his first state
3 habeas action. *See* Fast Track Statement, Exhibit 149 at 16–18; Reply to the Fast Track Response,
4 Exhibit 157 at 3–4; *see also* Appellant’s Opening Brief, Exhibit 81 at 10–14 (asserting closely-
5 related claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), on direct appeal). Ground 3 is
6 exhausted.

7 **C. Ground 4**

8 In Ground 4, Jones claims that his trial counsel was ineffective for failing to adequately
9 cross-examine lead detective Mayo regarding his custody over the video evidence concerning
10 September 19, 2007, robbery. *See* Amended Petition at 9. Jones argues that this claim was
11 exhausted on the appeal in his first state habeas action; he does so without citing to a location in his
12 briefing before the Nevada Supreme Court where the claim is raised. The court sees no statement of
13 this claim in that briefing. *See* Fast Track Statement, Exhibit 149; Reply to the Fast Track Response,
14 Exhibit 157. Ground 4 is unexhausted.

15 **D. Ground 6**

16 In Ground 6, Jones claims that his trial counsel was ineffective in four respects: (a) for failure
17 to view the videotape evidence concerning the September 19, 2007, robbery; (b) for failure to
18 investigate the video-recording equipment at two locations; (c) for failure to investigate the
19 prosecution’s use of ten still photographs to determine if their use was illegal; and (d) for failure to
20 investigate the prosecution’s use of ten still photographs to determine whether a photo lineup was
21 suggestive. *See* Amended Petition at 13.

22 Ground 6(a)—the claim that trial counsel was ineffective for failing to view the videotape
23 evidence concerning the September 19, 2007, robbery—is exhausted. *See* Fast Track Statement,
24 Exhibit 149 at 12-16; Reply to the Fast Track Response, Exhibit 157 at 1–3. Grounds 6(b), (c), and
25 (d)—the claims that trial counsel was ineffective for failing to investigate the video recording
26 equipment at two locations, for failing to investigate the prosecution’s use of ten still photographs to
27 determine if the use of them was illegal, and for failing to investigate the prosecution’s use of ten
28 still photographs to determine whether a photo lineup was suggestive—are also unexhausted. *See*

1 Fast Track Statement, Exhibit 149; Reply to the Fast Track Response, Exhibit 157.

2 **E. Ground 9**

3 In Ground 9, Jones claims that his appellate counsel was ineffective for failing to raise a
4 claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), with respect to a voluntary statement given
5 by Cesar Lopez, a victim of one of the robberies. See Amended Petition at 19. The court finds
6 Ground 9 to be exhausted in state court. See Fast Track Statement, Exhibit 149 at 28.

7 **F. Ground 10**

8 Ground 10 is a cumulative-error claim. See Amended Petition at 21. The court finds Ground
9 10 to be exhausted in state court. See Fast Track Statement, Exhibit 149 at 29.

10 **G. Summary Regarding Exhaustion of Claims**

11 The court, therefore, finds that Jones's habeas petition is "mixed" because it contains both
12 exhausted and unexhausted claims. Because Jones's amended petition contains claims found by this
13 court to be unexhausted in state court, the court will require Jones to make an election with respect to
14 these unexhausted claims.

15 For Grounds 2, 4, 6(b), 6(c), and 6(d), Jones must do one of the following: (1) file a
16 declaration stating that he wishes to abandon Grounds 2, 4, 6(b), 6(c), and 6(d) and proceed with the
17 litigation of his remaining exhausted claims in this case; (2) file a motion for a stay under *Rhines v.*
18 *Weber*, 544 U.S. 269 (2005), requesting a stay of this action while he exhausts his unexhausted
19 claims in state court; or (3) voluntarily dismiss this entire action without prejudice. Jones has until
20 July 10, 2015, to make that election. Jones is warned that, if he does not make that election by July
21 10, 2015, the court will dismiss his entire petition without prejudice under *Rose v. Lundy*, 455 U.S.
22 509 (1982).

23 Jones is warned that if he elects to voluntarily dismiss this action in its entirety "without
24 prejudice," he may be barred by the statute of limitations from ever initiating any subsequent federal
25 habeas corpus action. This is because—unless there is some form of tolling available to Jones that is
26 not now apparent to the court from the record—the limitations period imposed by section 2244(d)
27 has likely run out during the pendency of this federal habeas action. The filing of a federal habeas
28 corpus petition does not toll the statute of limitations relative to a subsequent federal habeas action.

1 See *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that “an application for federal habeas
2 corpus review is not an ‘application for State post-conviction or other collateral review’ within the
3 meaning of 28 U.S.C. § 2244(d)(2).”).

4 If Jones elects to file a motion for stay, he must make a showing in the motion that a stay is
5 warranted under *Rhines*. In *Rhines*, the United States Supreme Court narrowed the discretion of
6 federal district courts to impose stays to facilitate habeas petitioners’ exhaustion of claims in state
7 court:

8 [S]tay and abeyance should be available only in limited circumstances.
9 Because granting a stay effectively excuses a petitioner’s failure to
10 present his claims first to the state courts, stay and abeyance is only
11 appropriate when the district court determines there was good cause
12 for the petitioner’s failure to exhaust his claims first in state court.
13 Moreover, even if a petitioner had good cause for that failure, the
14 district court would abuse its discretion if it were to grant him a stay
15 when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. §
16 2254(b)(2) (“An application
17 for a writ of habeas corpus may be denied on the merits,
18 notwithstanding the failure of the applicant to exhaust the remedies
19 available in the courts of the State”).

20 [I]t likely would be an abuse of discretion for a district court to deny a
21 stay and to dismiss a mixed petition if the petitioner had good cause
22 for his failure to exhaust, his unexhausted claims are potentially
23 meritorious, and there is no indication that the
24 petitioner engaged in intentionally dilatory litigation tactics. In such
25 circumstances, the district court should stay, rather than dismiss, the
26 mixed petition.

27 *Rhines*, 544 U.S. at 277-78. In short, in a motion for stay, Jones must show (1) that there was good
28 cause for his failure to exhaust his unexhausted claims, (2) that his unexhausted claims are not
plainly meritless, and (3) that he has not engaged in intentionally dilatory litigation tactics.

22 **H. Respondents’ Argument that Grounds 2, 3, 7, and 9 are Conclusory**

23 Respondents argue in their motion to dismiss that Grounds 2, 3, 7, and 9 are conclusory and
24 should be summarily dismissed for that reason. See Motion to Dismiss (Doc. 12) at 7-9. The court
25 finds that this argument will be better addressed in conjunction with consideration of the merits of
26 Jones’s claims. If and when respondents are called upon to answer Jones’s claims with respect to
27 their merits, respondents may assert this argument in their answer, and the court will consider it at
28 that time. For now, the motion in this regard is denied without prejudice.

1 **Conclusion**

2 Accordingly,

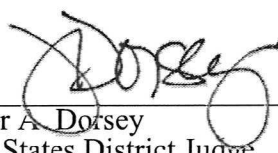
3 **IT IS HEREBY ORDERED** that respondents' Motion to Strike (**Doc. 26**) is **DENIED**;

4 **IT IS FURTHER ORDERED** that respondents' Motion to Strike (**Doc. 29**) is **DENIED**;

5 **IT IS FURTHER ORDERED** that respondents' Motion to Dismiss (**Doc. 12**) is

6 **GRANTED IN PART AND DENIED IN PART.** Grounds 2, 4, 6(b) (the claim that trial counsel
7 was ineffective for failing to investigate the video recording equipment at two locations), 6(c) (the
8 claim that trial counsel was ineffective for failing to investigate the prosecution's use of ten still
9 photographs to determine if the use of them was illegal, and 6(d) (the claim that trial counsel was
10 ineffective for failing to investigate the prosecution's use of ten still photographs to determine
11 whether a photo lineup was suggestive) are found unexhausted. **Jones has until July 10, 2015, to**
12 **do one of the following: (1) file a declaration stating that he wishes to abandon all the claims**
13 **found by this court to be unexhausted, (2) file a motion for a stay, requesting that this case be**
14 **stayed while he exhausts his unexhausted claims, or (3) file a declaration stating that he wishes**
15 **to voluntarily dismiss his entire habeas petition in this case without prejudice. If petitioner**
16 **does none of these things by July 10, 2015, the court will dismiss his entire habeas petition**
17 **without prejudice** under *Rose v. Lundy*, 455 U.S. 509 (1982). The motion to dismiss (Doc. 21) is
18 denied in all other respects.

19 Dated this 22nd day of May, 2015.

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21 Jennifer A. Dorsey
22 United States District Judge
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