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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FREDRICK JONES JR.,)	1:10-cv-00068-AWI-SKO-HC
)	
Petitioner,)	ORDER GRANTING AMENDMENT OF THE
)	PETITION TO NAME WARDEN MIKE
)	McDONALD AS RESPONDENT AND
v.)	ORDERING THE CLERK TO SUBSTITUTE
)	MIKE McDONALD AS RESPONDENT
MIKE McDONALD, WARDEN,)	
)	FINDINGS AND RECOMMENDATIONS RE:
Respondent.)	RESPONDENT'S MOTION TO DISMISS
)	(DOC. 18)
)	

DEADLINE FOR PETITIONER TO FILE
OBJECTIONS:
THIRTY (30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 303. Pending before the Court is Respondent's motion to dismiss the petition because it is a mixed petition containing both exhausted and unexhausted claims. The motion was filed on October 15, 2010. Petitioner filed an opposition and an amended opposition on December 6, 2010, and January 19, 2011. No reply was filed by Respondent.

1 I. Substitution of Mike McDonald, Warden of High Desert
2 State Prison, as Respondent

3 In this proceeding, the officer who has custody of the
4 petitioner must be named as the respondent. 28 U.S.C. § 2242;
5 Rule 2(a) of the Rules Governing Section 2254 Cases in the
6 District Courts (Habeas Rules). This is because the respondent
7 must have the power or authority to provide the relief to which a
8 petitioner is entitled. Smith v. Idaho, 392 F.3d 350, 355 n. 3
9 (9th Cir. 2004). A failure to name the proper respondent
10 destroys personal jurisdiction. Stanley v. California Supreme
11 Court, 21 F.3d 359, 360 (9th Cir. 1994).

12 However, personal jurisdiction, including the requirement of
13 naming the technically correct custodian under § 2242 and the
14 Habeas Rules, may be forfeited or waived on behalf of the
15 immediate custodian by the relevant government entity, such as
16 the state in a § 2254 proceeding. Smith v. Idaho, 392 F.3d 350,
17 355-56, 356 n.4 (9th Cir. 2004). A court has the discretion to
18 avoid delay and waste of the resources of the court and the
19 parties by recognizing a waiver instead of requiring formal
20 amendment of the petition by the petitioner. Id. at 356 n.6.

21 Here, Petitioner initially named Matthew Tate as the
22 Director of Corrections as Respondent. (Pet. 1.) However, in
23 the motion to dismiss, Respondent states that the proper
24 respondent is Mike McDonald, the current warden of High Desert
25 State Prison, where Petitioner is incarcerated. (Mot. 1:20-21,
26 28.) Further, the motion is filed on behalf of Respondent Mike
27 McDonald. (Id.) Respondent admits having custody of Petitioner
28 pursuant to the 2004 judgment of the Kings County Superior Court.

1 (Pet. 1: 23-24.)

2 The Court concludes that any objection to jurisdiction has
3 been waived. In the exercise of its administrative discretion,
4 the Court finds it appropriate to substitute Warden Mike McDonald
5 as the Respondent in this proceeding.

6 The Clerk is DIRECTED to substitute Warden Mike McDonald as
7 the Respondent in this proceeding.

8 II. Proceeding by a Motion to Dismiss

9 Because the petition was filed after April 24, 1996, the
10 effective date of the Antiterrorism and Effective Death Penalty
11 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
12 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
13 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

14 A district court must award a writ of habeas corpus or issue
15 an order to show cause why it should not be granted unless it
16 appears from the application that the applicant is not entitled
17 thereto. 28 U.S.C. § 2243. Rule 4 of the Rules Governing
18 Section 2254 Cases in the United States District Courts (Habeas
19 Rules) permits the filing of "an answer, motion, or other
20 response," and thus it authorizes the filing of a motion in lieu
21 of an answer in response to a petition. Rule 4, Advisory
22 Committee Notes, 1976 Adoption and 2004 Amendments. This gives
23 the Court the flexibility and discretion initially to forego an
24 answer in the interest of screening out frivolous applications
25 and eliminating the burden that would be placed on a respondent
26 by ordering an unnecessary answer. Advisory Committee Notes,
27 1976 Adoption. Rule 4 confers upon the Court broad discretion to
28 take "other action the judge may order," including authorizing a

1 respondent to make a motion to dismiss based upon information
2 furnished by respondent, which may show that a petitioner's
3 claims suffer a procedural or jurisdictional infirmity, such as
4 res judicata, failure to exhaust state remedies, or absence of
5 custody. Id.

6 In light of the broad language of Rule 4, it has been held
7 in this circuit that motions to dismiss are appropriate in cases
8 that proceed pursuant to 28 U.S.C. § 2254 and present procedural
9 issues that might limit consideration of the merits of the
10 petition. O'Bremski v. Maas, 915 F.2d 418, 420 (9th Cir. 1990)
11 (motion to dismiss for failure to raise any issue of federal law
12 based on the insufficiency of the facts as alleged in the
13 petition to justify relief as a matter of law); White v. Lewis,
14 874 F.2d 599, 602-03 (9th Cir. 1989) (procedural default in state
15 court); Hillery v. Pulley, 533 F.Supp. 1189, 1194 n.12 (E.D.Cal.
16 1982) (failure to exhaust state remedies considered after receipt
17 of evidence pursuant to Rule 7(a) to clarify whether or not a
18 possible defect, not apparent on the face of the petition, might
19 preclude a hearing on the merits). It is established in this
20 circuit that the filing of a motion to dismiss is expressly
21 authorized by Habeas Rule 4. Habeas Rule 4 Advisory Committee
22 Notes, 1976 Adoption and 2004 Amendments; Gutierrez v. Griggs,
23 695 F.2d 1195, 1198 (9th Cir. 1983).

24 The filing of a motion to dismiss instead of an answer was
25 authorized by the Court's order of August 31, 2010, which
26 referred to the possibility of Respondent's filing a motion to
27 dismiss and set forth a briefing schedule if such a motion were
28 filed. (Order, doc. 9, 4-5.)

1 Further, Habeas Rule 7 permits the Court to direct the
2 parties to expand the record by submitting additional materials
3 relating to the petition and to authenticate such materials,
4 which may include letters predating the filing of the petition,
5 documents, exhibits, affidavits, and answers under oath to
6 written interrogatories propounded by the judge. Habeas Rule
7 7(a), (b). If, upon expansion of the record, the Court perceives
8 that a defect not apparent on the face of the petition may
9 preclude a hearing on the merits, then the Court may proceed to
10 determine a motion to dismiss. Hillery v. Pulley, 533 F.Supp.
11 1189, 1196.

12 In Blackledge v. Allison, 431 U.S. 63, 80-81 (1977), the
13 United States Supreme Court suggested that summary judgment
14 standards should be used to test whether facially adequate
15 allegations have a sufficient basis in fact to warrant plenary
16 presentation of evidence. The Court noted that expansion of the
17 record in a given case could demonstrate that an evidentiary
18 hearing is unnecessary, and the Court specifically advised that
19 there might be cases in which expansion of the record would
20 provide evidence against a petitioner's contentions so
21 overwhelming as to justify a conclusion that an allegation of
22 fact does not raise a substantial issue of fact. Id. at 81. In
23 such circumstances, the petitioner is entitled to "careful
24 consideration and plenary processing of (his claim,) including
25 full opportunity for presentation of the relevant facts." Id. at
26 82-83.

27 Summary judgment standards were likewise applied in Hillery
28 v. Pulley, 533 F.Supp. 1189, 1197 (E.D.Cal. 1982), where the

1 Court stated:

2 The standards under Rule 56 are well known (footnote
3 omitted). To paraphrase them for purposes of habeas
4 proceedings, it may be said that a motion to dismiss a
5 petition for habeas corpus made after expansion of
6 the record may only be granted when the matters on file
7 reveal that there is no genuine issue of material
8 fact "which if resolved in accordance with the
petitioner's contentions would entitle him to relief...
(citation omitted). Only if it appears from
undisputed facts... that as a matter of law petitioner
is entitled to discharge, or that as a matter of law
he is not, may an evidentiary hearing be avoided."
(Citation omitted.)

9 533 F.Supp. 1197.

10 In the present case, the record was expanded in connection
11 with the motion to dismiss to include facts concerning
12 Petitioner's presentation of his claims to the state courts.
13 Pursuant to the foregoing standards, this expansion of the record
14 may permit summary disposition of the petition without a full
15 evidentiary hearing. Further, although the parties disagree on
16 the application of the law to the facts, it does not appear that
17 the parties dispute any material facts concerning the pertinent
18 filings in state court.

19 Accordingly, pursuant to Habeas Rule 4, the Court will
20 review the facts alleged in the petition and as reflected in the
21 evidentiary materials submitted by the parties in connection with
22 the motion to dismiss.

23 III. Exhaustion of Petitioner's Claims

24 A. Legal Standards

25 A petitioner who is in state custody and wishes to challenge
26 collaterally a conviction by a petition for writ of habeas corpus
27 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
28 The exhaustion doctrine is based on comity to the state court and

1 gives the state court the initial opportunity to correct the
2 state's alleged constitutional deprivations. Coleman v.
3 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
4 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
5 1988).

6 A petitioner can satisfy the exhaustion requirement by
7 providing the highest state court with the necessary jurisdiction
8 a full and fair opportunity to consider each claim before
9 presenting it to the federal court, and demonstrating that no
10 state remedy remains available. Picard v. Connor, 404 U.S. 270,
11 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
12 1996). A federal court will find that the highest state court
13 was given a full and fair opportunity to hear a claim if the
14 petitioner has presented the highest state court with the claim's
15 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
16 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
17 (1992), superceded by statute as stated in Williams v. Taylor,
18 529 U.S. 362 (2000) (factual basis).

19 Additionally, the petitioner must have specifically told the
20 state court that he was raising a federal constitutional claim.
21 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
22 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala
23 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,
24 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United
25 States Supreme Court reiterated the rule as follows:

26 In Picard v. Connor, 404 U.S. 270, 275...(1971),
27 we said that exhaustion of state remedies requires that
28 petitioners "fairly presen[t]" federal claims to the
state courts in order to give the State the
"'opportunity to pass upon and correct' alleged

1 violations of the prisoners' federal rights" (some
2 internal quotation marks omitted). If state courts are
3 to be given the opportunity to correct alleged violations
4 of prisoners' federal rights, they must surely be
5 alerted to the fact that the prisoners are asserting
6 claims under the United States Constitution. If a
7 habeas petitioner wishes to claim that an evidentiary
8 ruling at a state court trial denied him the due
9 process of law guaranteed by the Fourteenth Amendment,
10 he must say so, not only in federal court, but in state
11 court.

12 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
13 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.
14 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th
15 Cir. 2001), stating:

16 Our rule is that a state prisoner has not "fairly
17 presented" (and thus exhausted) his federal claims
18 in state court unless he specifically indicated to
19 that court that those claims were based on federal law.
20 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
21 2000). Since the Supreme Court's decision in Duncan,
22 this court has held that the petitioner must make the
23 federal basis of the claim explicit either by citing
24 federal law or the decisions of federal courts, even
25 if the federal basis is "self-evident," Gatlin v. Madding,
26 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
27 Harless, 459 U.S. 4, 7... (1982), or the underlying
28 claim would be decided under state law on the same
considerations that would control resolution of the claim
on federal grounds, see, e.g., Hiivala v. Wood, 195
F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
at 865.

...
In Johnson, we explained that the petitioner must alert
the state court to the fact that the relevant claim is a
federal one without regard to how similar the state and
federal standards for reviewing the claim may be or how
obvious the violation of federal law is.

Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as
amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
2001).

Where none of a petitioner's claims has been presented to
the highest state court as required by the exhaustion doctrine,

1 the Court must dismiss the petition. Raspberry v. Garcia, 448
2 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
3 481 (9th Cir. 2001). Further, where some claims are exhausted
4 and others are not (i.e., a "mixed" petition), the Court must
5 dismiss the petition without prejudice to give Petitioner an
6 opportunity to exhaust the claims if he can do so. Rose, 455
7 U.S. at 510, 521-22; Calderon v. United States Dist. Court
8 (Gordon), 107 F.3d 756, 760 (9th Cir. 1997), en banc, cert.
9 denied, 118 S.Ct. 265 (1997); Greenawalt v. Stewart, 105 F.3d
10 1268, 1273 (9th Cir. 1997), cert. denied, 117 S.Ct. 1794 (1997).
11 However, the Court must give a petitioner an opportunity to amend
12 a mixed petition to delete the unexhausted claims and permit
13 review of properly exhausted claims. Rose v. Lundy, 455 U.S. at
14 520; Calderon v. United States Dist. Ct. (Taylor), 134 F.3d 981,
15 986 (9th Cir. 1998), cert. denied, 525 U.S. 920 (1998); James v.
16 Giles, 221 F.3d 1074, 1077 (9th Cir. 2000).

17 B. Petitioner's Claims

18 1. Procedural Background

19 Petitioner is serving a sentence of fifty-two (52) years to
20 life imposed by the Kings County Superior Court in case number
21 03CM7616 for attempted murder, assault with a deadly weapon,
22 robbery, and burglary involving the use of firearms. (Pet. 1, 8;
23 Mot. 1-2.) Before trial, Petitioner's retained trial counsel
24 notified the court of concerns that Petitioner was incompetent;
25 the court suspended criminal proceedings pursuant to Cal. Pen.
26 Code § 1368 and ordered a competency hearing. Defendant sought
27 to waive counsel and proceed pro se. The trial court determined
28 that Petitioner was competent to waive his right to counsel and

1 to represent himself, and that he made a knowing and voluntary
2 waiver of his right to counsel. The court granted Petitioner's
3 motion to represent himself. The Court then commenced a § 1368
4 competency hearing, at which Petitioner represented himself,
5 waived a jury trial, and submitted the competency issue on two
6 medical reports. The trial court found that Petitioner was
7 competent to stand trial, and Petitioner continued to represent
8 himself throughout trial. (LD 4, 2-3.)

9 On November 14, 2006, in Petitioner's initial appeal from
10 the judgment of conviction (California Court of Appeal, Fifth
11 Appellate District, case no. F046435), the state intermediate
12 appellate concluded that the trial court's ruling on the motion
13 for self-representation while a competency hearing was pending
14 was a violation of Petitioner's Sixth and Fourteenth Amendment
15 rights to counsel. It also noted that Petitioner had been
16 entitled to be represented by counsel at the competency hearing
17 pursuant to Cal. Pen. Code § 1368(a). Without considering the
18 other issues raised by Petitioner, the Court of Appeal remanded
19 the matter to the trial court to determine whether or not a
20 retrospective competency hearing was feasible; if feasible, to
21 conduct the hearing, and if Petitioner were found competent to
22 stand trial, to reinstate the judgment. (Mot. 2; LD 4, 2-8.)¹

23 The trial court found that a retrospective competency
24 hearing was feasible, held a trial on Petitioner's competence,
25 found him competent, and reinstated the judgment. (L.D. 9, 2.)

26
27 ¹
28 "LD" refers to the numbers assigned in Respondent's "NOTICE OF
LODGING," received on October 15, 2010, to the documents submitted to the
Court by Respondent in connection with the motion to dismiss.

1 On January 26, 2009, in Petitioner's second appeal (no. F053127),
2 the state intermediate appellate court considered issues
3 pertaining to the guilt trial as well as the competency
4 determinations made on remand, and affirmed the judgment of
5 conviction. (Id. at 2-10.)

6 A petition for review filed in the California Supreme Court
7 on February 26, 2009, was denied on April 22, 2009 (no. S170257).
8 (LD 12, 13.)

9 On February 24, 2009, Petitioner filed a petition for writ
10 of habeas corpus in the state intermediate appellate court, which
11 was denied on April 7, 2009. (LD 10, 11.)

12 On April 24, 2009, Petitioner filed a petition for writ of
13 habeas corpus in the California Supreme Court (no. S172355) (LD
14 14), which was denied on October 15, 2010 (LD 15).

15 2. Exhaustion of Specific Claims

16 Reference to the documentation before the Court reflects
17 that Petitioner raised numerous claims before the California
18 Supreme Court.

19 Petitioner claimed that upon remand, the trial court applied
20 the standard for competence to stand trial which was insufficient
21 to determine competence to waive the right to counsel because it
22 did not address Petitioner's actual understanding of the
23 significance and consequences of the decision to waive counsel
24 and represent himself. Petitioner further argued that he was
25 entitled to a jury trial on the issue of competence to act as his
26 own attorney. (LD 12 at 2-3, 11.)

27 Petitioner raised the following claims in his habeas
28 petition in the California Supreme Court: 1) appellate counsel

1 Charles M. Bonneau rendered ineffective representation because he
2 a) failed to raise arguable issues on appeal, such as the trial
3 court's denial of Petitioner's motion for counsel of choice on
4 appeal, etc. (LD 14, 2-3), and b) failed to raise the issues in
5 the petition for review (LD 14, 4); 2) the appellate court erred
6 and deprived Petitioner of procedural due process by not
7 responding to Petitioner's issue concerning the trial court's
8 failure properly to respond to Petitioner's motion for ancillary
9 funds (LD 14 at 3, 5); 3) the trial court erred and violated
10 Petitioner's rights to equal protection of the laws under the
11 Sixth and Fourteenth Amendments by a) denying Petitioner's motion
12 to quash the impaneled jury, and b) not including a questionnaire
13 in the appellate transcript (LD 14 at 3, 6); 4) appellate counsel
14 Charles M. Bonneau rendered ineffective representation and
15 violated Petitioner's rights under the Sixth and Fourteenth
16 Amendments by failing to raise an arguable issue on appeal
17 concerning the trial court's failure properly to respond to
18 Petitioner's motion for ancillary funds (LD 14 at 3, 7); and 5)
19 in violation of Petitioner's Sixth and Fourteenth Amendment
20 rights, appellate counsel Charles M. Bonneau failed to raise in
21 the petition for review an arguable issue concerning the trial
22 court's failure to appoint counsel of choice for Petitioner (LD
23 14, 4).

24 C. Claims Raised in the Petition before the Court

25 Petitioner first alleges that the appellate court erred in
26 not reversing Petitioner's case when it found that Petitioner was
27 denied counsel in a competency proceeding. (Pet. 12.)

28 ///

1 Respondent interprets this contention as an assertion that
2 the appellate court erred in not reversing on all grounds raised
3 in the initial appeal, as opposed to reversing on only one
4 ground. (Mot. 4:19-23.) However, it does not appear that the
5 appellate court reversed the judgment; rather, it directed a
6 limited remand for the purpose of determinations concerning the
7 feasibility of a retrospective competency hearing and related
8 proceedings. The appellate court expressly left the
9 determination as to whether or not the judgment would be reversed
10 or affirmed to the trial court. (LD 4, 7-8.)

11 Viewing the claim in context, Petitioner appears to contend
12 that once the appellate court found that Petitioner had been
13 denied counsel in a competency proceeding, it should have
14 reversed the judgment of conviction, as distinct from choosing
15 the remedy of a limited remand that would eventually result in a
16 determination by the trial court of whether or not the judgment
17 of conviction would be reversed. This contention was not raised
18 in the petition for review or the petition for writ of habeas
19 corpus. Thus, Petitioner did not exhaust his state court
20 remedies as to this claim.

21 In his second claim, Petitioner alleges that on remand, the
22 trial court erred by finding that a retrospective competency
23 determination was feasible, and by placing the burden on
24 Petitioner to prove incompetence. (Pet. 12.) Petitioner did not
25 present these issues to the California Supreme Court. Thus,
26 these claims are not exhausted.

27 In the third claim, Petitioner alleges that the appellate
28 court erred in the initial appeal by not responding to the other

1 grounds raised in the opening brief in that proceeding. (Pet
2 12.) The grounds Petitioner refers to in the petition include
3 the absence of representation by counsel at the competency
4 hearings, the argument that a retrospective competency hearing
5 would not remedy the situation, the trial court's failure to
6 perform its duty to revoke Petitioner's pro se status when it was
7 apparent that he was unable or unwilling to abide by procedural
8 rules, motions to disqualify judges and for ancillary services,
9 the erroneous failure of the trial court to appoint another judge
10 to determine what ancillary funds would be granted to Petitioner,
11 the trial court's holding of hearings on funding in the presence
12 of the County Counsel and permitting County Counsel to argue
13 against funding, and the trial court's improper response to the
14 motion for ancillary funds under California case law and
15 statutory law. (Pet. 12.)

16 In his habeas petition, Petitioner argued to the California
17 Supreme Court that the appellate court deprived Petitioner of
18 procedural due process by not responding to Petitioner's
19 contention concerning the trial court's failure to respond
20 properly to Petitioner's motion for ancillary funds. (LD 14 at
21 3, 5.) It does not appear that Petitioner presented to the
22 California Supreme court the appellate court's failure to
23 consider any of the other issues that did not pertain to the
24 motion for ancillary funds and that were omitted from the
25 appellate court's opinion in the initial appeal.

26 Therefore, with respect to Petitioner's contentions
27 concerning the alleged denial of procedural due process resulting
28 from the appellate court's failure to address additional issues

1 raised in the initial appeal, only the portion of the claim
2 concerning the trial court's treatment of and ruling on
3 Petitioner's motion for ancillary funds was exhausted.

4 Petitioner's fourth claim in the petition before the Court
5 is that the appellate remand to the trial court and the
6 competency trial held on remand were improperly limited to
7 Petitioner's competence to stand trial, and did not include
8 adequate consideration of Petitioner's competence to assist
9 counsel or waive counsel. (Pet. 12.) These issues were
10 presented to the California Supreme Court in the petition for
11 review, and are thus exhausted.

12 In the fifth claim, Petitioner alleges that the trial court
13 failed to explain to Petitioner that he had a right to appointed
14 counsel during the competency hearing. (Pet. 12.) This issue
15 was not presented to the California Supreme Court, and thus it is
16 not exhausted.

17 In the sixth claim, Petitioner argues that the trial court
18 erred in not appointing Petitioner his counsel of choice for the
19 competency proceedings on remand. (Pet. 12-13.) Petitioner did
20 not present this claim to the California Supreme Court. Although
21 Petitioner argued to that court that his appellate counsel had
22 rendered ineffective assistance by not raising the issue of
23 denial of counsel of choice, the specific issue of denial of
24 counsel of choice in the remanded proceedings was not actually
25 presented to the California Supreme Court. (LD 14, 2-4.) Thus,
26 the claim is not exhausted.

27 In the seventh claim, Petitioner contends that the trial
28 court erred by finding that the prosecution had demonstrated that

1 two doctors' reports constituted a preponderance of the evidence.
2 (Pet. 13.) This contention is reasonably understood as relating
3 to evidence of competence. Petitioner did not present this claim
4 to the California Supreme Court, and thus, it is not exhausted.

5 In the eighth claim, Petitioner alleges that the trial court
6 erred by not appointing counsel during the competency hearing and
7 then, after remand, appointing a "Conflict of Int[e]rest Counsel"
8 over Petitioner's objections and despite three Marsden hearings.

9 (Pet. 13.) It is apparent from the appellate opinion following
10 the remand that on remand, counsel was appointed for Petitioner.
11 (LD 9, 2.) Thus, this claim must refer to the first competency
12 hearing. Petitioner did not present this issue to the California
13 Supreme Court. Insofar as Petitioner complains of the counsel
14 who was appointed on remand, Petitioner's complaint was not
15 presented to the California Supreme Court. Thus, Petitioner's
16 eighth claim was not exhausted.

17 In the ninth claim, Petitioner alleges that during the
18 competency proceedings after remand, the trial court erred by
19 placing the burden of proof on Petitioner instead of requiring an
20 affirmative showing of competency by the prosecution. (Pet. 13.)
21 Petitioner did not present this issue to the California Supreme
22 Court. Thus, the claim is not exhausted.

23 In the tenth claim, Petitioner alleges that the lower courts
24 overlooked Petitioner's claim pursuant to People v. James Ary,
25 Jr., 173 Cal.App.4th 80 (2009). (Pet. 13.) Review has been
26 granted in that case, which is now depublished. The case
27 concerned the burden of proof in retrospective competency
28 hearings. Petitioner's claim in the petition before the Court

1 is unclear and uncertain. However, Petitioner did not present a
2 claim concerning this case to the California Supreme Court.²
3 Although Petitioner claims that he did so by a supplemental
4 affidavit or declaration to a petition, a review of the dockets
5 of the Supreme Court in cases that could possibly pertain to
6 Petitioner (nos. S136706, S126290, S170257, and S172355) reveals
7 no supplemental submissions.³ Thus, the Court concludes that
8 this claim was not exhausted.

9 Petitioner points to portions of the petition for writ of
10 habeas corpus filed in the California Supreme Court in which he
11 summarized not the grounds raised to that court, but rather the
12 grounds he had earlier raised in separate proceedings in the
13 intermediate state appellate court. Petitioner claims that this
14 summary reference was sufficient to present the grounds to the
15 California Supreme Court. For example, with respect to his claim
16 that the appellate court erred in the first appeal by not
17 considering all of his grounds, Petitioner identified this ground
18 in the state habeas petition as one that was raised in an appeal.
19 (LD 14, 8.) However, in the pertinent portion of the habeas
20 petition where grounds for relief raised in that very proceeding
21 were to be stated, Petitioner referred specifically only to the
22 appellate court's failure to respond to Petitioner's appellate
23

24
25 ² A predecessor of the case, People v. Ary, 118 Cal.App.4th 1016 (2004),
was cited in the petition for review in connection with an argument concerning
the inadequacy of the retrospective competency determination. (LD 12, 13.)

26
27 ³ The Court may take judicial notice of court records. Fed. R. Evid.
201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993);
28 Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978),
aff'd, 645 F.2d 699 (9th Cir. 1981).

1 issue concerning the trial court's mishandling of Petitioner's
2 motion for ancillary funds. (LD 14 at 2, 5.) There was no
3 mention of the several other issues that were likewise not
4 mentioned by the Court of Appeal.

5 To satisfy the exhaustion requirement, the petitioner must
6 have fairly presented the substance of his federal claim to the
7 state courts. It is not necessary to identify any specific
8 constitutional provision, but a petitioner is expected to present
9 the state court with all the operative facts giving rise to the
10 asserted constitutional principle. Chacon v. Wood, 36 F.3d 1459,
11 1467-68 (9th Cir. 1994), superseded by statute on other grounds,
12 28 U.S.C. § 2253. A change in facts alleged in a claim does not
13 affect exhaustion if the facts are merely supplemental, but it
14 renders a claim unexhausted if the differences fundamentally
15 alter the legal claim. Vasquez v. Hillery, 474 U.S. 254, 257-58,
16 260 (1986).

17 Here, Petitioner did not present to the California Supreme
18 Court all the specific issues which he considered to have been
19 improperly disregarded by the appellate court; he merely
20 mentioned one such issue. The issue raised concerned the trial
21 court's ruling on his motion for ancillary funds; the other
22 issues included representation by counsel at a competency
23 hearing, the inadequacy of the remedy of a retrospective
24 competency hearing, revocation of Petitioner's pro se status, and
25 motions to disqualify judges. The factual predicates of the
26 various claims are widely divergent.

27 To add to this petition numerous sub-issues based on
28 different facts would permit Petitioner to bypass presentation of

1 claims to the state's highest court so long as one of a category
2 of issues was presented. This is inconsistent with the
3 principles upon which the exhaustion doctrine rests.

4 Further, it is established that a reference to a second
5 source or document where additional issues might be raised is not
6 sufficient to constitute presentation of a claim. Generally a
7 state prisoner does not fairly present a claim to a state court
8 if, in order to find the material in question, that court must
9 read beyond a petition, brief, or similar document that does not
10 itself alert the court to the presence of a federal claim.

11 Baldwin v. Reese, 541 U.S. 27, 32 (2004); accord, Castillo v.
12 McFadden, 399 F.3d 993, 1000 (9th Cir. 2005) (a statement of an
13 issue in motions and briefing in the trial court was held not
14 sufficient to alert an appellate court to the issue); Robinson v.
15 Kramer, 588 F.3d 1212, 1217 (9th Cir. 2009) (a trial transcript
16 reflecting the raising of an issue was not alone sufficient to
17 present the claim to the appellate court). Presenting an issue
18 to the state intermediate appellate court does not constitute
19 presentation to the California Supreme Court.

20 The Court notes that Petitioner represents that Respondent
21 has agreed that the petition is timely and that reversal is
22 required for some of Petitioner's claims. (Opp. [doc. 23], 10-
23 11.) The Court has reviewed the motion to dismiss and concludes
24 that Respondent has not conceded that the petition is timely or
25 that Petitioner is entitled to relief.

26 The Court thus concludes that some of Petitioner's claims
27 are exhausted, and some are not.

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1 IV. Delay in Petitioner's Access to Legal Materials

2 In his initially filed opposition, Petitioner declared that
3 after the motion to dismiss was filed on October 15, 2010,
4 Petitioner sought a sixty-day extension of time to oppose the
5 motion because involvement in an altercation in prison resulted
6 in Petitioner's being charged with the murder of another prisoner
7 and placement in segregated housing; Petitioner prepared the
8 opposition from memory because he was not allowed access to his
9 legal materials. (Doc. 23, 13-15.) In his supplemental
10 opposition filed on January 19, 2011, Petitioner states that
11 although he received some of his legal materials, he had not had
12 sufficient time to go through them. Nevertheless, he
13 supplemented his opposition by referring to the petition for writ
14 of habeas corpus that he filed in the California Supreme Court.
15 (Doc. 24.) Petitioner did not request any further extension of
16 time. In view of the nature of the issues presented in this
17 motion and Petitioner's ability to file an opposition, it does
18 not appear that the temporary restriction of Petitioner's access
19 to his legal materials has affected his ability to respond to the
20 motion.

21 V. Recommendation

22 In summary, the Court concludes that the petition is a mixed
23 petition.

24 Where none of a petitioner's claims has been presented to
25 the highest state court as required by the exhaustion doctrine,
26 the Court must dismiss the petition. Raspberry v. Garcia, 448
27 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
28 481 (9th Cir. 2001). Further, where some claims are exhausted

1 and others are not (i.e., a "mixed" petition), the Court must
2 dismiss the petition without prejudice to give Petitioner an
3 opportunity to exhaust the claims if he can do so. Rose, 455
4 U.S. at 510, 521-22; Calderon v. United States Dist. Court
5 (Gordon), 107 F.3d 756, 760 (9th Cir. 1997), en banc, cert.
6 denied, 118 S.Ct. 265 (1997); Greenawalt v. Stewart, 105 F.3d
7 1268, 1273 (9th Cir. 1997), cert. denied, 117 S.Ct. 1794 (1997).
8 However, the Court must give a petitioner an opportunity to amend
9 a mixed petition to delete the unexhausted claims and permit
10 review of properly exhausted claims. Rose v. Lundy, 455 U.S. at
11 520; Calderon v. United States Dist. Ct. (Taylor), 134 F.3d 981,
12 986 (9th Cir. 1998), cert. denied, 525 U.S. 920 (1998); James v.
13 Giles, 221 F.3d 1074, 1077 (9th Cir. 2000).

14 The instant petition is a mixed petition containing
15 exhausted and unexhausted claims. The Court must dismiss the
16 petition without prejudice unless Petitioner withdraws the
17 unexhausted claims and proceeds with the exhausted claims in lieu
18 of suffering dismissal.

19 Therefore, it is RECOMMENDED that:

20 1) The Court GRANT Petitioner thirty (30) days from the
21 date of service of this order to file a motion to withdraw the
22 unexhausted claims; and

23 2) The Court INFORM Petitioner that in the event that
24 Petitioner does not file such a motion within the pertinent time
25 period, the Court will assume Petitioner desires to return to
26 state court to exhaust the unexhausted claims and will therefore
27 grant the motion to dismiss and will dismiss the petition without
28

1 prejudice.⁴

2 These findings and recommendations are submitted to the
3 United States District Court Judge assigned to the case, pursuant
4 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
5 the Local Rules of Practice for the United States District Court,
6 Eastern District of California. Within thirty (30) days after
7 being served with a copy, any party may file written objections
8 with the Court and serve a copy on all parties. Such a document
9 should be captioned "Objections to Magistrate Judge's Findings
10 and Recommendations." Replies to the objections shall be served
11 and filed within fourteen (14) days (plus three (3) days if
12 served by mail) after service of the objections. The Court will
13 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
14 636 (b) (1) (C). The parties are advised that failure to file
15 objections within the specified time may waive the right to
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
17

18
19 ⁴ Petitioner is informed that a dismissal for failure to exhaust will not
20 itself bar him from returning to federal court after exhausting his available
21 state remedies. However, this does not mean that Petitioner will not be
22 subject to the one-year statute of limitations imposed by 28 U.S.C. § 2244(d).
23 Although the limitations period is tolled while a properly filed request for
24 collateral review is pending in state court, 28 U.S.C. § 2244(d) (2), it is not
25 tolled for the time an application is pending in federal court. Duncan v.
26 Walker, 533 U.S. 167, 172 (2001).

27 Petitioner is further informed that the Supreme Court has held in
28 pertinent part:

23 [I]n the habeas corpus context it would be appropriate
24 for an order dismissing a mixed petition to instruct an
25 applicant that upon his return to federal court he is to
26 bring only exhausted claims. See Fed. Rules Civ. Proc. 41(a)
27 and (b). Once the petitioner is made aware of the exhaustion
28 requirement, no reason exists for him not to exhaust all potential
claims before returning to federal court. The failure to comply
with an order of the court is grounds for dismissal with prejudice.
Fed. Rules Civ. Proc. 41(b).
Slack v. McDaniel, 529 U.S. 473, 489 (2000). Therefore, Petitioner is
forewarned that in the event he returns to federal court and files a mixed
petition of exhausted and unexhausted claims, the petition may be dismissed
with prejudice.

1 1153 (9th Cir. 1991).

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3 IT IS SO ORDERED.

4 **Dated: February 23, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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