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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUDY CASTILLO,)	1:12-cv-00302-LJO-BAM-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION TO
)	DENY RESPONDENT'S MOTION TO
)	DISMISS THE PETITION (DOC. 15)
v.)	
)	FINDINGS AND RECOMMENDATION TO
F B HAWS, Warden,)	DISMISS AS MOOT PETITIONER'S
)	MOTION FOR STAY AND ABEYANCE
Respondent.)	(DOC. 17)
)	
_____)		<u>OBJECTIONS DEADLINE:</u>
		<u>THIRTY (30) DAYS</u>

Petitioner is a state prisoner proceeding pro se 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 through 304. Pending before the Court are two, intertwined motions. On May 14, 2012, Respondent filed a motion to dismiss the petition because it is a "mixed" petition containing some claims as to which state court remedies were not exhausted; Respondent also filed supporting documentation. In response, on June 6, 2012, Petitioner filed a request for stay and abeyance of the petition so that he might return to state court to exhaust state court remedies as to

1 unexhausted claims. Respondent filed opposition to the request
2 for a stay on June 20, 2012. No reply has been filed.

3 I. Proceeding by a Motion to Dismiss

4 Because the petition was filed after April 24, 1996, the
5 effective date of the Antiterrorism and Effective Death Penalty
6 Act of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.
7 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d
8 1484, 1499 (9th Cir. 1997).

9 A district court may entertain a petition for a writ of
10 habeas corpus by a person in custody pursuant to the judgment of
11 a state court only on the ground that the custody is in violation
12 of the Constitution, laws, or treaties of the United States. 28
13 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
14 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,
15 16 (2010) (per curiam).

16 Rule 4 of the Rules Governing Section 2254 Cases in the
17 United States District Courts (Habeas Rules) allows a district
18 court to dismiss a petition if it "plainly appears from the face
19 of the petition and any exhibits annexed to it that the
20 petitioner is not entitled to relief in the district court...."

21 The Ninth Circuit has allowed respondents to file motions to
22 dismiss pursuant to Rule 4 instead of answers if the motion to
23 dismiss attacks the pleadings by claiming that the petitioner has
24 failed to exhaust state remedies or has violated the state's
25 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,
26 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss
27 a petition for failure to exhaust state remedies).

28 Further, a respondent may file a motion to dismiss after the

1 Court orders the respondent to respond, and the Court should use
2 Rule 4 standards to review a motion to dismiss filed before a
3 formal answer. See, Hillery v. Pulley, 533 F. Supp. 1189, 1194 &
4 n.12 (C.D.Cal. 1982).

5 In this case, upon being directed to respond to the petition
6 by way of answer or motion, Respondent filed the motion to
7 dismiss. The material facts pertinent to the motion are to be
8 found in the pleadings and in copies of the official records of
9 state judicial proceedings which have been provided by the
10 parties, and as to which there is no factual dispute.

11 The Court will therefore review Respondent's motion to
12 dismiss pursuant to its authority under Rule 4.

13 II. Motion to Dismiss the Petition

14 A. Background

15 Petitioner's petition (doc. 1) was filed on February 16,
16 2012, and transferred to this division of this Court on February
17 29, 2012.

18 In the petition, Petitioner alleges that he is an inmate of
19 the California State Prison at Los Angeles County (CSP-LAC)
20 serving a sentence of life without the possibility of parole plus
21 one year for first degree murder in the course of a robbery and
22 while armed with a firearm in violation of Cal. Pen. Code
23 §§ 187(a), 190.2(a), and 12022(a). (Pet. 1.)

24 Petitioner raises the following claims in the petition: 1)
25 Petitioner's rights under the Fifth Amendment and the Miranda
26 decision were violated when he was arrested at gunpoint and
27 questioned without understanding that he had a right to refuse to
28 answer questions and to wait for an attorney to come and help

1 him, and without ever indicating that he did so understand; 2)
2 Petitioner's Sixth Amendment right to the effective assistance of
3 counsel was violated by his trial counsel's prejudicial failure
4 to move to suppress Petitioner's extra-judicial statement after
5 failing to ask Petitioner any questions concerning the mode of
6 his arrest or whether he ever indicated that he understood his
7 rights. (Id. at 5.)

8 The Court has reviewed documents filed by Respondent in
9 support of the motion to dismiss, namely, a petition for review
10 filed by Petitioner in the California Supreme Court (LD 1,¹ case
11 number S175423), a petition for writ of habeas corpus filed in
12 the California Supreme Court (LD 3, case number S194485), and
13 orders denying those petitions (LD 2, LD 4).

14 Petitioner's ineffective assistance claims related to the
15 alleged Miranda violation were not raised in Petitioner's
16 petition for review in the course of his direct appeal. (LD 1.)
17 Further, the copy of the petition for writ of habeas corpus filed
18 in the California Supreme Court shows that Petitioner raised the
19 claim that his Miranda rights were violated by admission of a
20 statement made to law enforcement officers during post-arrest
21 questioning because he did not understand his rights or indicate
22 that he understood and waived them. (LD 3, 7.) Petitioner also
23 raised a claim that his trial counsel was ineffective because he
24 failed to argue that Petitioner's first statement to police
25 violated Miranda because Petitioner did not waive his rights.
26 (Id. at 9.)

27
28 ¹ "LD" refers to documents lodged by Respondent in support of the motion
to dismiss.

1 Petitioner did not expressly allege as grounds for the
2 habeas petition his trial counsel's alleged failure to ask
3 Petitioner questions about the mode of his arrest or any
4 indication by Petitioner to the interrogating officers that he
5 understood his rights. However, Petitioner set forth details
6 regarding his interrogation and alleged specifically that he did
7 not state or express that he understood and waived his rights
8 (id. at 7); further, he alleged that counsel did not respond to
9 questions from appointed appellate counsel regarding why he did
10 not challenge the Miranda violation (id. at 9), and Petitioner
11 referred to appellate counsel's declaration, in which appellate
12 counsel noted that trial counsel had sent a page of the
13 preliminary hearing transcript showing that a detective who
14 questioned Petitioner after his arrest testified in court that
15 Petitioner said during the interrogation that he understood his
16 rights. (Decl., first page.)

17 Also attached to the petition filed in the California
18 Supreme Court was a copy of the decision of the Superior Court of
19 the State of California for the County of Madera (MCSC) in a
20 habeas corpus proceeding filed by Petitioner. The decision
21 detailed Petitioner's claim regarding his trial counsel's failure
22 to move to suppress Petitioner's confession. It summarized the
23 evidence admitted at an evidentiary hearing held in the MCSC on
24 the ineffective assistance claim, including trial counsel's
25 testimony that he had asked Petitioner if Petitioner had told the
26 detective that Petitioner understood his rights, and that
27 Petitioner had responded that he nodded "yes" to the detective,
28 indicating that he had understood his rights. (MCSC order at 2.)

1 The MCSC's decision also noted that at the evidentiary hearing,
2 Petitioner denied having nodded "yes," or having told his counsel
3 that he had done so. (Id.) The MCSC noted that one response of
4 the detective in the transcript of the interrogation suggested
5 that Petitioner had nodded that he understood his rights;
6 further, counsel had successfully moved to exclude another
7 statement. The MCSC expressly determined that in light of the
8 all the evidence, counsel was credible, and Petitioner was not.
9 (Id. at 2-3.)

10 B. Exhaustion of State Court Remedies

11 A petitioner who is in state custody and wishes to challenge
12 collaterally a conviction by a petition for writ of habeas corpus
13 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
14 The exhaustion doctrine is based on comity to the state court and
15 gives the state court the initial opportunity to correct the
16 state's alleged constitutional deprivations. Coleman v.
17 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
18 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
19 1988).

20 A petitioner can satisfy the exhaustion requirement by
21 providing the highest state court with the necessary jurisdiction
22 a full and fair opportunity to consider each claim before
23 presenting it to the federal court, and demonstrating that no
24 state remedy remains available. Picard v. Connor, 404 U.S. 270,
25 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
26 1996). A federal court will find that the highest state court
27 was given a full and fair opportunity to hear a claim if the
28 petitioner has presented the highest state court with the claim's

1 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
2 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
3 (1992), superceded by statute as stated in Williams v. Taylor,
4 529 U.S. 362 (2000) (factual basis).

5 Additionally, the petitioner must have specifically told the
6 state court that he was raising a federal constitutional claim.

7 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
8 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala
9 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,
10 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United

11 States Supreme Court reiterated the rule as follows:

12 In Picard v. Connor, 404 U.S. 270, 275...(1971),
13 we said that exhaustion of state remedies requires that
14 petitioners "fairly presen[t]" federal claims to the
15 state courts in order to give the State the
16 "'opportunity to pass upon and correct' alleged
17 violations of the prisoners' federal rights" (some
18 internal quotation marks omitted). If state courts are
19 to be given the opportunity to correct alleged violations
20 of prisoners' federal rights, they must surely be
21 alerted to the fact that the prisoners are asserting
22 claims under the United States Constitution. If a
23 habeas petitioner wishes to claim that an evidentiary
24 ruling at a state court trial denied him the due
25 process of law guaranteed by the Fourteenth Amendment,
26 he must say so, not only in federal court, but in state
27 court.

28 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
further in 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), stating:

Our rule is that a state prisoner has not "fairly
presented" (and thus exhausted) his federal claims
in state court unless he specifically indicated to
that court that those claims were based on federal law.
See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
2000). Since the Supreme Court's decision in Duncan,
this court has held that the petitioner must make the
federal basis of the claim explicit either by citing

1 federal law or the decisions of federal courts, even
2 if the federal basis is "self-evident," Gatlin v. Madding,
3 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
4 Harless, 459 U.S. 4, 7... (1982), or the underlying
5 claim would be decided under state law on the same
6 considerations that would control resolution of the claim
7 on federal grounds, see, e.g., Hiivala v. Wood, 195
8 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
9 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
10 at 865.

11 ...
12 In Johnson, we explained that the petitioner must alert
13 the state court to the fact that the relevant claim is a
14 federal one without regard to how similar the state and
15 federal standards for reviewing the claim may be or how
16 obvious the violation of federal law is.

17 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as
18 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
19 2001).

20 Where none of a petitioner's claims has been presented to
21 the highest state court as required by the exhaustion doctrine,
22 the Court must dismiss the petition. Raspberry v. Garcia, 448
23 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
24 481 (9th Cir. 2001). Further, where some claims are exhausted
25 and others are not (i.e., a "mixed" petition), the Court must
26 dismiss the petition without prejudice to give Petitioner an
27 opportunity to exhaust the claims if he can do so. Rose, 455
28 U.S. at 510, 521-22; Calderon v. United States Dist. Court
(Gordon), 107 F.3d 756, 760 (9th Cir. 1997), en banc, cert.
denied, 118 S.Ct. 265 (1997); Greenawalt v. Stewart, 105 F.3d
1268, 1273 (9th Cir. 1997), cert. denied, 117 S.Ct. 1794 (1997).
However, the Court must give a petitioner an opportunity to amend
a mixed petition to delete the unexhausted claims and permit
review of properly exhausted claims. Rose v. Lundy, 455 U.S. at
520; Calderon v. United States Dist. Ct. (Taylor), 134 F.3d 981,

1 986 (9th Cir. 1998), cert. denied, 525 U.S. 920 (1998); James v.
2 Giles, 221 F.3d 1074, 1077 (9th Cir. 2000).

3 C. Analysis

4 A federal claim is fairly presented if raised in the
5 petition itself, an accompanying brief, or another similar
6 document filed with that court. Gentry v. Sinclair, 693 F.3d
7 867, 880 (9th Cir. 2012) (citing Baldwin v. Reese, 541 U.S. 27,
8 32 (2004)). Reference in an attachment or appendix to a petition
9 is sufficient. Scott v. Schriro, 567 F.3d 573, 582-83 (9th Cir.
10 2009).

11 Here, in the Supreme Court petition, Petitioner not only
12 identified the overarching failure of counsel to object to the
13 alleged Miranda violation, but also submitted the record of the
14 proceedings in the MCSC, which detailed the factual dispute
15 between Petitioner and his counsel with respect to both
16 Petitioner's communications with counsel concerning any waiver
17 and the extent of counsel's investigation into waiver.
18 Petitioner's submission of facts relating to the alleged
19 ineffective assistance of counsel on the Miranda issue included
20 matter pertinent to the question of counsel's investigation or
21 preparation on the issue. Petitioner's more direct assertions in
22 the present petition regarding counsel's alleged failure to
23 investigate his arrest or his purported waiver of Miranda rights
24 amount to reiterations of the factual matter set forth in the
25 Supreme Court petition in relation to counsel's ineffective
26 assistance.

27 The Court of Appeals for the Ninth Circuit has recently
28 summarized the pertinent legal standards concerning fair

1 presentation and new facts as follows:

2 Constitutional claims must be "fairly presented" in
3 state court to provide those courts an opportunity to
4 act on them. Duncan v. Henry, 513 U.S. 364, 365, 115
5 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam). "It
6 would be contrary to [the] purpose [of Section 2254(b)]
7 to allow a petitioner to overcome an adverse
8 state-court decision with new evidence introduced in a
9 federal habeas court and reviewed by that court in the
10 first instance effectively *de novo*." Cullen v.
11 Pinholster, 563 U.S. ----, 131 S.Ct. 1388, 1399, 179
12 L.Ed.2d 557 (2011). Therefore, a claim has not been
13 fairly presented in state court if new factual
14 allegations (1) "fundamentally alter the legal claim
15 already considered by the state courts," Vasquez v.
16 Hillery, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d
17 598 (1986); Beaty v. Stewart, 303 F.3d 975, 989-90 (9th
18 Cir.2002), or (2) "place the case in a significantly
19 different and stronger evidentiary posture than it was
20 when the state courts considered it," Aiken v.
21 Spalding, 841 F.2d 881, 883 (9th Cir.1988); *accord*
22 Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir.1988).

23 Dickens v. Ryan, 688 F.3d 1054, 1067 (9th Cir. 2012).

24 Given the extent of the factual matter set forth by
25 Petitioner in the petition for writ of habeas corpus filed in the
26 California Supreme Court, Petitioner's allegations here
27 concerning counsel's failure to ask about the circumstances of
28 his purported waiver of Miranda rights neither fundamentally
alter the legal claim already presented nor place the case in a
significantly different and stronger evidentiary posture than it
was when the California Supreme Court considered it. The Court
understands Petitioner's claim to relate to counsel's failure to
have the statement excluded from evidence, and it interprets
Petitioner's references to counsel's specific omissions in
questioning Petitioner to constitute factual matter in support of
such a claim.

The Court further notes that reference to Petitioner's
motion for a stay, which includes a copy of the petition that

1 Petitioner would file in the California Supreme Court to exhaust
2 his claim, is consistent with such an interpretation. (Mot., doc.
3 17 at 7.)

4 The Court concludes that Petitioner fairly presented his
5 claim of ineffective assistance of counsel to the California
6 Supreme Court.

7 Accordingly, it will be recommended that Respondent's motion
8 to dismiss the petition as a mixed petition be denied.

9 III. Petitioner's Motion for a Stay

10 In his motion for a stay, Petitioner argued that he had
11 presented his ineffective assistance claim in his petition for
12 writ of habeas corpus to the California Supreme Court. He
13 further requested a stay in order to permit further exhaustion of
14 state court remedies in the California Supreme Court as to any
15 claim regarding which state court remedies were found not to have
16 been exhausted.

17 As previously noted, the claim that Petitioner would raise
18 in the California Supreme Court is essentially the same claim
19 that he previously raised before that court. Because this Court
20 has concluded that Petitioner fairly presented his claim of
21 ineffective assistance of counsel to the California Supreme
22 Court, Petitioner's request for a stay has been rendered moot.

23 Accordingly, it will be recommended that Petitioner's motion
24 for a stay and abeyance be dismissed as moot.

25 IV. Recommendation

26 Accordingly, it is RECOMMENDED that:

27 1) Respondent's motion to dismiss the petition as a mixed
28 petition be DENIED; and

