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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARMELO MEZA BUENO,)	Case No. CV 14-0687-JEM
)	
Petitioner,)	
)	MEMORANDUM OPINION AND ORDER
v.)	GRANTING MOTION TO DISMISS AND
)	DENYING CERTIFICATE OF
THE PEOPLE OF THE STATE OF)	APPEALABILITY
CALIFORNIA,)	
)	
Respondent.)	
_____)	

PROCEDURAL HISTORY

Following a jury trial in Los Angeles County Superior Court case number BA373550, Petitioner was convicted of possession of a controlled substance for sale (Cal. Health & Safety Code § 11378). The jury found true the allegation that Petitioner possessed over 20 kilograms of methamphetamine (Cal. Health & Safety Code § 11370.4(b)(4)). The trial court sentenced Petitioner to sixteen years and four months in state prison. (Respondent’s Lodged Document (“LD”) 1 at 118, 174, 180-81, 211-12, 226.)

Petitioner appealed, and the California Court of Appeal affirmed the judgment on April 30, 2013. (LD 2-5.) Petitioner filed a petition for review in the California Supreme Court, which was denied on July 24, 2013. (LD 6-7.)

The public docket indicates that Petitioner did not file any habeas petitions in the California Supreme Court. (See <http://appellatecases.courtinfo.ca.gov> (last visited Dec. 5, 2014).)

1 On January 29, 2014, Petitioner filed the instant Petition for Writ of Habeas Corpus
2 (“Petition”) pursuant to 28 U.S.C. § 2254.

3 On May 21, 2014, Respondent filed a Motion to Dismiss the Petition as unexhausted,
4 arguing that Ground Five of the Petition has not been presented to the California Supreme
5 Court. (Motion to Dismiss at 3-5.)

6 On July 1, 2014, the Court sua sponte granted Petitioner an extension of time to file an
7 Opposition to the Motion to Dismiss to July 15, 2014. Petitioner did not file an Opposition.

8 On November 4, 2014, the Court issued an “Order Re: Election of Proceedings for
9 ‘Mixed Petition’” (“Order”), in which the Court informed Petitioner that Ground Five appeared
10 to be unexhausted and ordered Petitioner to choose one of several options regarding how to
11 proceed with his Petition. Among other choices, Petitioner was offered the opportunity to return
12 to state court to exhaust Ground Five or to abandon Ground Five and proceed with his
13 exhausted claims. The Court warned Petitioner that failure to respond to the Order could result
14 in the Court granting Respondent’s Motion to Dismiss.

15 To date, Petitioner has not responded to the Order or opposed the Motion to Dismiss.

16 **PETITIONER’S CLAIMS**

17 Ground One: The trial court denied Petitioner’s Sixth Amendment and due process
18 rights by failing to instruct the jury with Petitioner’s requested pinpoint instruction on the specific
19 intent to sell narcotics. (Petition at 5.)

20 Ground Two: The prosecutor committed misconduct during closing argument by
21 encouraging the jury to consider punishment. (Petition at 5-6.)

22 Ground Three: The trial court’s explanation of reasonable doubt diluted the standard of
23 proof and denied Petitioner’s rights to due process and to a verdict of guilt beyond a reasonable
24 doubt. (Petition at 6.)

25 Ground Four: The cumulative impact of the errors raised in Grounds One through Three
26 encouraged the jury to convict Petitioner absent proof of guilt beyond a reasonable doubt.
27 (Petition at 6.)

28

1 Ground Five: Petitioner requests that this Court review the trial court's in camera
2 hearings and determine whether the trial court erred. (Petition at 6.)

3 **DISCUSSION**

4 Respondent argues that the Petition is a "mixed petition" that must be dismissed
5 because Ground Five was never presented to the California Supreme Court. As discussed
6 below, Ground Five was never presented to the California Supreme Court. Accordingly, the
7 Court grants Respondent's Motion to Dismiss and dismisses the Petition without prejudice.

8 **I. The Exhaustion Requirement**

9 As a matter of comity, a federal court will not grant habeas relief to a petitioner held in
10 state custody unless he has exhausted the available state judicial remedies on every ground
11 presented in the petition. 28 U.S.C. § 2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 518-22
12 (1982). "[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity
13 to resolve federal constitutional claims before these claims are presented to the federal courts
14" O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); see also Baldwin v. Reese, 541 U.S.
15 27, 29 (2004).

16 Exhaustion requires that the petitioner's contentions be presented to and disposed of on
17 the merits by the highest court of the State. James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994); see
18 also Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). "[F]or purposes of exhausting state
19 remedies, a claim for relief in habeas corpus must include reference to a specific federal
20 constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief."
21 Gray v. Netherland, 518 U.S. 152, 162-63 (1996). Petitioner has the burden of demonstrating
22 that he has exhausted available state remedies. See Williams v. Craven, 460 F.2d 1253, 1254
23 (9th Cir. 1972).

24 Petitions that include exhausted and unexhausted claims are "mixed petitions" that
25 ordinarily should be denied without prejudice. See Rose, 455 U.S. at 522; Guizar v. Estelle,
26 843 F.2d 371, 372 (9th Cir. 1988). However, a court may not dismiss a mixed petition without
27 first affording the petitioner an opportunity to amend the petition to delete the unexhausted
28

1 claims. James v. Giles, 221 F.3d 1074, 1077-78 (9th Cir. 2000); see also Jefferson v. Budge,
2 419 F.3d 1013, 1016 (9th Cir. 2005).

3 **II. Ground Five Is Unexhausted and the Petition Should Be Dismissed**

4 In Ground Five, Petitioner requests that this Court “review the trial court’s in camera
5 hearings and [determine] whether the trial court erred.” (Petition at 6.) However, Petitioner did
6 not challenge the trial court’s in camera review procedures in his petition for review to the
7 California Supreme Court. (LD 6.) Although Petitioner attached the Court of Appeal opinion,
8 which addressed Ground Five, to his petition for review, he did not include this claim in the
9 petition itself. Merely attaching the Court of Appeal opinion to the petition for review, without
10 more, did not fairly present Ground Five to the California Supreme Court for decision. “[A] state
11 prisoner does not ‘fairly present’ a claim to a state court if that court must read beyond a petition
12 or a brief (or a similar document) that does not alert it to the presence of a federal claim in order
13 to find material, such as a lower court opinion in the case, that does so.” Baldwin, 541 U.S. at
14 32; accord Castillo v. McFadden, 399 F.3d 993, 999-1000 (9th Cir. 2005); see also Gatlin v.
15 Madding, 189 F.3d 882, 888-89 (9th Cir. 1999) (California Rules of Court expressly prohibit
16 incorporation by reference of authorities or arguments from another document and, therefore,
17 a court on federal habeas review may not rely on them in evaluating whether petitioner has
18 exhausted his state court remedies). In order to exhaust a federal habeas claim, a petitioner
19 must present to the State’s highest court both the factual and the federal constitutional basis
20 of each claim. Gray, 518 U.S. at 162-63; Duncan v. Henry, 513 U.S. 364, 365-66 (1995).
21 Because Petitioner never presented Ground Five to the California Supreme Court, this claim
22 is unexhausted. Thus, the Petition is a “mixed petition” that is subject to dismissal.

23 In the Order, the Court offered Petitioner several options that would have allowed him
24 to avoid dismissal of the entire Petition at this juncture, including the option to exhaust Ground
25 Five by returning to state court or the option to withdraw this claim and pursue his exhausted
26 claims. Petitioner declined to exercise any of those options, and the Petition remains a “mixed
27 petition.” Accordingly, the Petition should be dismissed without prejudice. See Rose, 455 U.S.
28 at 522.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Respondent's Motion to Dismiss Petition (**Document No. 12**) is hereby **granted**.
2. Judgment shall be entered dismissing the action without prejudice.
3. A Certificate of Appealability is **denied**.

DATED: December 5, 2014

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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