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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAXIMILIANO LEDEZMA,
Petitioner

v.

RAYMOND MADDEN,
Respondent.

Case No. 2:16-cv-2794-DMG (SK)

**ORDER TO SHOW CAUSE
WITHIN 30 DAYS RE:
MIXED PETITION**

I.

INTRODUCTION

On April 22, 2016, Petitioner, a prisoner in state custody proceeding pro se, filed a 28 U.S.C. § 2254 Petition (“Pet.”) alleging four grounds for relief. (Dkt 1). Petitioner consented to proceed before a U.S. Magistrate Judge for all proceedings. (Dkt 2). On June 28, 2016, Respondent filed a Motion to Dismiss the Petition, arguing that Petitioner has not exhausted Ground Four by fairly raising that claim in the California Supreme Court and that the unexhausted claim is, in any case, procedurally defaulted. (Dkt 9). Petitioner’s required Opposition to the Motion to Dismiss was due on July 28, 2016 (Dkt 4), but as of the date of this Order, no Opposition or request for an extension of time to file the Opposition has been filed. Upon review of the Petition, the Motion to Dismiss, and the Lodged Documents (“LD”), it appears Respondent’s Motion is well-founded and the Petition is subject to

1 dismissal because it is “mixed” — that is, it contains both exhausted and
2 unexhausted claims.

3 II.

4 DISCUSSION

5 Federal courts may not grant habeas relief to a person held in state
6 custody unless the person has exhausted available state court remedies as to
7 each of the issues presented. *See* 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*,
8 455 U.S. 509, 518 (1982); *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th
9 Cir. 2005). To satisfy the exhaustion requirement, a habeas petitioner must
10 “fairly present” his federal claim to the state courts, that is, give them a fair
11 opportunity to consider and correct violations of the petitioner’s federal
12 rights. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam);
13 *Peterson v. Lampert*, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). A
14 state prisoner seeking relief with respect to a California conviction is
15 required to “fairly present” his federal claims to the California Supreme
16 Court. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

17 Here, Petitioner has not raised Ground 4 – his ineffective assistance of
18 counsel claim – in the California Supreme Court either on direct appeal or
19 on collateral review. Accordingly, the Petition is a mixed petition and must
20 be dismissed unless the unexhausted claim is deleted. *See Lundy*, 455 U.S.
21 at 510 (28 U.S.C. §§ 2254(b) and (c) require “a federal district court to
22 dismiss a petition for a writ of habeas corpus containing any claims that have
23 not been exhausted in the state courts”). Petitioner can avoid outright
24 dismissal of the entire mixed petition by amending the petition “to delete
25 any unexhausted claims and to proceed on the exhausted claims.” *Butler v.*
26 *Long*, 752 F.3d 1177, 1180 (9th Cir. 2014) (per curiam). The purpose of this
27 Order to Show Cause is to afford Petitioner the final opportunity to seek
28 federal habeas consideration of at least his exhausted claims. Alternately, if

1 Petitioner maintains that his Petition is entirely exhausted, this Order
2 provides Petitioner a second opportunity to present that position by way of a
3 timely Opposition to the Motion to Dismiss.

4 **III.**

5 **CONCLUSION**

6 It appears to the Court that the Petition is mixed because Ground 4 has
7 not been fairly presented to the California Supreme Court in a state habeas
8 petition. Because the Court has no authority to consider mixed petitions,
9 unless Petitioner deletes the unexhausted claim, the Petition is subject to
10 outright dismissal as a mixed petition under *Rose v. Lundy*. **In addition,**
11 **Petitioner is expressly cautioned that by the rules of this Court the**
12 **“failure to file any required document, or the failure to file it**
13 **within the deadline, may be deemed consent to the granting . . . of**
14 **the motion [to dismiss].” Local Rule 7-12.**

15 THEREFORE, within 30 days of the date of this Order, Petitioner is
16 ordered to show cause why Respondent’s Motion to Dismiss should not be
17 granted on the ground that Petitioner has failed to exhaust all his federal
18 habeas claims. Petitioner may satisfy and discharge this Order to Show
19 Cause by filing, within 30 days of the date of this Order, either (1) an
20 Opposition to the Motion to Dismiss that sets forth Petitioner’s position as to
21 whether Ground 4 is unexhausted and/or procedurally defaulted; or (2) a
22 First Amended Petition that deletes Ground 4 and alleges – only – his three
23 exhausted claims (Grounds One through Three). **If Petitioner does not**
24 **file a timely response to this Order to Show Cause or a timely First**
25 **Amended Petition deleting his unexhausted claim, Petitioner is**
26 **advised that the Court will recommend dismissal of the Petition.**

27 FURTHERMORE, if Petitioner files a properly-exhausted and timely
28 First Amended Petition pursuant to this Order, Respondent shall file an

1 Answer within 30 days of service of the First Amended Petition without
2 further order of court. Respondent shall also file a notice of consent or non-
3 consent to Magistrate Judge jurisdiction at the time of filing of the Answer,
4 with the understanding that there are no adverse consequences for non-
5 consent. Thereafter, Petitioner shall file a Traverse to the Answer – or a
6 Waiver of Traverse if he does not intend to file a Traverse – within 30 days of
7 the filing of Respondent’s Answer. Unless otherwise ordered by the Court,
8 this matter will be deemed submitted upon the expiration of Petitioner’s
9 deadline to file a Traverse or Waiver of Traverse.

10 **IT IS SO ORDERED.**

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12 DATED: August 12, 2016

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14 STEVE KIM
15 U.S. MAGISTRATE JUDGE
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