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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EDUARDO BALTIERA,	)	1:10-cv-00590-LJO-SKO-HC
	)	
Petitioner,	)	ORDER DISCHARGING ORDER TO SHOW
	)	CAUSE (DOC. 9)
	)	
v.	)	ORDER GRANTING PETITIONER'S
	)	MOTION TO FILE A FIRST AMENDED
M. McDONALD, Warden,	)	PETITION (DOC. 12)
	)	
Respondent.	)	ORDER DEEMING THE PETITION FILED
	)	IN RESPONSE TO THE ORDER TO SHOW
_____	)	CAUSE TO BE PETITIONER'S FIRST
	)	AMENDED PETITION (DOC. 12, 3-12)
		ORDER REQUIRING RESPONDENT TO
		FILE A RESPONSE TO THE FIRST
		AMENDED PETITION
		ORDER SETTING A BRIEFING SCHEDULE
		ORDER DIRECTING THE CLERK TO
		SERVE DOCUMENTS ON THE ATTORNEY
		GENERAL

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition 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 the Court's order to Petitioner to show cause why the petition should not be dismissed for failure to exhaust state

1 court remedies and the Court's direction to Petitioner to  
2 withdraw unexhausted claims, which was filed on November 24,  
3 2010. Petitioner responded to the order on February 17, 2011.

#### 4 I. Screening the Petition

5 Rule 4 of the Rules Governing § 2254 Cases in the United  
6 States District Courts (Habeas Rules) requires the Court to make  
7 a preliminary review of each petition for writ of habeas corpus.  
8 The Court must summarily dismiss a petition "[i]f it plainly  
9 appears from the petition and any attached exhibits that the  
10 petitioner is not entitled to relief in the district court...."  
11 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
12 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
13 1990).

14 The Court may dismiss a petition for writ of habeas corpus  
15 either on its own motion under Rule 4, pursuant to the  
16 respondent's motion to dismiss, or after an answer to the  
17 petition has been filed. Advisory Committee Notes to Habeas Rule  
18 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
19 (9th Cir. 2001). A petition for habeas corpus should not be  
20 dismissed without leave to amend unless it appears that no  
21 tenable claim for relief can be pleaded were such leave granted.  
22 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

#### 23 II. Exhaustion of State Court Remedies

##### 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 v.  
23 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood, 133  
24 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States  
25 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  
29 considerations that would control resolution of the claim  
30 on federal grounds, see, e.g., Hiivala v. Wood, 195  
31 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,  
32 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d  
33 at 865.

34 ...

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

40 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as  
41 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.  
42 2001).

#### 43 B. Petitioner's Claims

44 Petitioner raises the following claims in the originally  
45 filed petition concerning his 2007 convictions in the Madera

1 County Superior Court: 1) whether pursuant to Cal. Pen. Code §  
2 667.6(d), a mandatory consecutive sentence was required for  
3 conviction of aggravated sexual assault of a child (Cal. Pen.  
4 Code § 269) despite the crime's not being specified in the  
5 governing statute; 2) whether the trial court was required to  
6 inquire if a Spanish-language interpreter was sufficient when the  
7 court was on notice that Petitioner's primary language was a  
8 Central American Indian language; 3) whether the trial court  
9 erred in denying a motion for a new trial after newly discovered  
10 evidence revealed that a principal prosecution witness was a  
11 serial child abuser, which in turn would have explained how the  
12 two victims were able to provide detailed accounts of the facts  
13 concerning sexual abuse; 4) whether there was sufficient evidence  
14 of an attempt where the evidence showed only completed crimes,  
15 and the prosecutor elected not to use the completed crimes to  
16 support the charge of attempt; 5) whether material, exculpatory  
17 evidence was suppressed; and 6) whether Petitioner's trial and  
18 appellate counsel rendered ineffective assistance for failing to  
19 raise the issue of suppression of evidence, thereby depriving  
20 Petitioner of a key defense. (Pet. 4-5, 7-9, 11.)<sup>1</sup>

21 Petitioner admitted in his petition that he did not present  
22 to any state or federal court his fifth and sixth grounds  
23 concerning suppression of evidence and related claims concerning  
24 allegedly ineffective assistance of trial and appellate counsel.

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26 <sup>1</sup>Grounds 5 and 6 are not mentioned except in response to a question  
27 concerning what grounds were not presented to the state courts (pet. 11);  
28 however, it appears that Petitioner intended to raise these grounds in the  
petition. Petitioner further states that some of the petition was not copied.  
(Pet. 9-10, 13.) Accordingly, the Court will broadly construe the scope of  
the grounds raised in the petition.

1 (Pet. 9, 11.)

2 With respect to Petitioner's first through fourth claims,  
3 Petitioner alleged that he had raised the claims before the Court  
4 of Appeal of the State of California, Fifth Appellate District  
5 (DCA), but he admitted that other than a direct appeal, no other  
6 applications had been filed. Further, Petitioner did not state  
7 whether he appealed to the highest state court having  
8 jurisdiction the result of any action taken on any application to  
9 the state courts. (Pet. 4, 6.)

10 In response to the order to show cause, Petitioner submitted  
11 a declaration under penalty of perjury and an amended, verified  
12 petition from which the fifth and sixth admittedly unexhausted  
13 claims were deleted. With respect to the remaining claims as to  
14 which exhaustion was not affirmatively alleged in the originally  
15 filed petition, Petitioner did not provide a copy of any  
16 petitions that he had submitted to the California Supreme Court.  
17 Petitioner states in his declaration that although the records  
18 are unavailable, he was under the impression that his first,  
19 second, and third claims were presented to the California Supreme  
20 Court. (Doc. 12, 1-2.) In the amended petition, Petitioner  
21 states that other than a direct appeal from the judgment of  
22 conviction and sentence, he had not previously filed any  
23 petitions with respect to the challenged judgment. He does not  
24 respond to the questions concerning an appeal to the highest  
25 state court with respect to any petition or application. (Doc.  
26 12, 8.)

27 A search of the official website for the California courts  
28 reflects that a petition for review from a criminal appeal in

1 Petitioner's case was filed in the California Supreme Court in  
2 People v. Eduardo Infante Baltierra, case number S167839, in  
3 October 2008, and was denied in December 2008.<sup>2</sup>

4 In summary, the face of the petition and Petitioner's  
5 declaration in response to the Court's order to show cause reveal  
6 that state court remedies were not exhausted as to the fifth and  
7 sixth claims concerning suppression of evidence and related  
8 ineffective assistance of counsel. However, it is unclear from  
9 the face of the petition whether state court remedies were  
10 exhausted as to the additional claims and whether Petitioner is  
11 entitled to relief. 28 U.S.C. § 2243.

12 III. Discharge of the Order to Show Cause

13 Because Petitioner timely responded to the order to show  
14 cause, the order will be discharged.

15 IV. Amendment of the Petition

16 The Court deems Petitioner's motion to abandon claims (doc.  
17 12) filed in response to the order to show cause to be a motion  
18 to amend the petition to delete the admittedly unexhausted fifth  
19 and sixth claims. The Court deems the petition submitted with  
20 the motion (doc. 12, 3-12) to be a proposed first amended  
21 petition.

22 Petitioner's motion to file a first amended petition will be  
23 granted, and the petition filed in connection with the motion  
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25 <sup>2</sup>The Court may take judicial notice of facts that are capable of  
26 accurate and ready determination by resort to sources whose accuracy cannot  
27 reasonably be questioned, including undisputed information posted on official  
28 web sites. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,  
333 (9th Cir. 1993); Daniels-Hall v. National Education Association, 629 F.3d  
992, 999 (9th Cir. 2010). It is appropriate to take judicial notice of the  
docket sheet of a California court. White v Martel, 601 F.3d 882, 885 (9th  
Cir. 2010), cert. denied, 131 S.Ct. 332 (2010).

1 will be deemed to be the first amended petition.

2 IV. Disposition

3 Accordingly, it is hereby ORDERED that:

4 1) The order to show cause that issued on November 24,  
5 2010, is DISCHARGED; and

6 2) Petitioner's motion to amend the petition to delete  
7 unexhausted claims is GRANTED; and

8 3) The petition filed as part of Petitioner's response to  
9 the order to show cause and motion to abandon unexhausted claims  
10 (doc. 12, 3-12) is DEEMED to be Petitioner's first amended  
11 petition; and

12 4) Pursuant to Rule 4 of the Rules Governing Section 2254  
13 Cases and Rule 16 of the Federal Rules of Civil Procedure,<sup>3</sup> the  
14 Court hereby ORDERS:

15 a) Respondent SHALL FILE a RESPONSE to the first amended  
16 petition<sup>4</sup> within **SIXTY (60) days** of the date of service of this  
17 order. See Rule 4, Rules Governing Section 2254 Cases; Cluchette  
18 v. Rushen, 770 F.2d 1469, 1473-1474 (9th Cir. 1985) (court has  
19 discretion to fix time for filing a response). A response can be  
20 made by filing one of the following:

21 i) An ANSWER addressing the merits of the petition.

22 Respondent SHALL INCLUDE with the ANSWER any and all

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24 <sup>3</sup>The Federal Rules of Civil Procedure "apply to proceedings for habeas  
25 corpus ... to the extent that the practice in those proceedings (A) is not  
26 specified in a federal statute, the Rules Governing Section 2254 Cases, or the  
27 Rules Governing Section 2255 Cases; and (B) has previously conformed to the  
28 practice in civil actions." Fed. R. Civ. P. 81(a)(4). Rule 12 also provides  
"[t]he Federal Rules of Civil Procedure, to the extent that they are not  
inconsistent with any statutory provisions or these rules, may be applied to a  
proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases.

<sup>4</sup>Respondent is advised that a scanned copy of the petition is available  
in the Court's electronic case filing system (CM/ECF).



1 transcripts or other documents necessary for the  
2 resolution of the issues presented in the petition.

3 See Rule 5, Rules Governing Section 2254 Cases.

4 Any argument by Respondent that a claim of Petitioner  
5 has been *procedurally defaulted* SHALL BE MADE in the  
6 ANSWER, but must also address the merits of the claim  
7 asserted.

8 ii) A MOTION TO DISMISS the petition. A motion to  
9 dismiss SHALL INCLUDE copies of all Petitioner's  
10 state court filings and dispositive rulings.

11 See Rule 5, Rules Governing Section 2254 Cases.<sup>5</sup>

12 b) If Respondent files an answer to the petition,  
13 Petitioner MAY FILE a traverse within **THIRTY (30) days** of the  
14 date Respondent's answer is filed with the Court. If no traverse  
15 is filed, the petition and answer are deemed submitted at the  
16 expiration of the thirty (30) days.

17 c) If Respondent files a motion to dismiss, Petitioner  
18 SHALL FILE an opposition or statement of non-opposition within  
19 **TWENTY-ONE (21) days** of the date Respondent's motion is filed  
20 with the Court. If no opposition is filed, the motion to dismiss  
21 is deemed submitted at the expiration of the thirty (30) days.  
22 Any reply to an opposition to the motion to dismiss SHALL BE  
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24 <sup>5</sup>Rule 4 of the Rules Governing Section 2254 Cases provides that upon the  
25 Court's determination that summary dismissal is inappropriate, the "judge must  
26 order the respondent to file an answer, motion, or other response within a  
27 fixed time, or to take other action the judge may order." Rule 4, Rules  
28 Governing Section 2254 Cases; see also Advisory Committee Notes to Rules 4 and  
5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate  
the need for filing an answer on the substantive merits of the petition and  
that the respondent may file a motion to dismiss for failure to exhaust);  
White v. Lewis , 874 F.2d 599, 602-03 (9th Cir. 1989) (providing that a motion  
to dismiss pursuant to Rule 4 is proper in a federal habeas proceeding).

1 FILED within **SEVEN (7) days** after the opposition is served.

2 d) Unless already submitted, both Respondent and  
3 Petitioner SHALL COMPLETE and RETURN to the Court within **THIRTY**  
4 **(30) days** a consent/decline form indicating whether the party  
5 consents or declines to consent to the jurisdiction of the United  
6 States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

7 e) The Clerk of the Court is DIRECTED to SERVE a copy of  
8 this order on the Attorney General or his representative.

9 All motions shall be submitted on the record and briefs  
10 filed without oral argument unless otherwise ordered by the  
11 Court. Local Rule 230(1). Requests for extensions of time will  
12 only be granted upon a showing of good cause. All provisions of  
13 Local Rule 110 are applicable to this order.

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15 IT IS SO ORDERED.

16 **Dated: July 11, 2011**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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