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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDUARDO BALTIERA,)	1:10-cv-00590-LJO-SKO-HC
)	
Petitioner,	)	ORDER DIRECTING PETITIONER TO
	)	WITHDRAW HIS UNEXHAUSTED CLAIMS
v.	)	WITHIN THIRTY (30) DAYS OF
	)	SERVICE OR SUFFER DISMISSAL OF
	)	THE ACTION
M. McDONALD, Warden,)	
	)	ORDER TO PETITIONER TO SHOW CAUSE
Respondent.	)	IN THIRTY (30) DAYS WHY THE
	)	PETITION SHOULD NOT BE DISMISSED
	)	FOR PETITIONER'S FAILURE TO
	)	EXHAUST STATE REMEDIES

**DEADLINE FOR WITHDRAWAL OF
UNEXHAUSTED CLAIM OR CLAIMS, AND
RESPONSE TO ORDER TO SHOW CAUSE:
THIRTY (30) DAYS AFTER SERVICE**

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 petition, which was filed on March 22, 2010.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make

1 a preliminary review of each petition for writ of habeas corpus.
2 The Court must summarily dismiss a petition "[i]f it plainly
3 appears from the petition and any attached exhibits that the
4 petitioner is not entitled to relief in the district court...."
5 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
6 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
7 1990).

8 The Court may dismiss a petition for writ of habeas corpus
9 either on its own motion under Rule 4, pursuant to the
10 respondent's motion to dismiss, or after an answer to the
11 petition has been filed. Advisory Committee Notes to Habeas Rule
12 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
13 (9th Cir. 2001). A petition for habeas corpus should not be
14 dismissed without leave to amend unless it appears that no
15 tenable claim for relief can be pleaded were such leave granted.
16 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

17 II. Exhaustion of State Court Remedies

18 A. Legal Standards

19 A petitioner who is in state custody and wishes to challenge
20 collaterally a conviction by a petition for writ of habeas corpus
21 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
22 The exhaustion doctrine is based on comity to the state court and
23 gives the state court the initial opportunity to correct the
24 state's alleged constitutional deprivations. Coleman v.
25 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
26 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
27 1988).

28 A petitioner can satisfy the exhaustion requirement by

1 providing the highest state court with the necessary jurisdiction
2 a full and fair opportunity to consider each claim before
3 presenting it to the federal court, and demonstrating that no
4 state remedy remains available. Picard v. Connor, 404 U.S. 270,
5 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
6 1996). A federal court will find that the highest state court
7 was given a full and fair opportunity to hear a claim if the
8 petitioner has presented the highest state court with the claim's
9 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
10 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
11 (1992), superceded by statute as stated in Williams v. Taylor,
12 529 U.S. 362 (2000) (factual basis).

13 Additionally, the petitioner must have specifically told the
14 state court that he was raising a federal constitutional claim.
15 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
16 (9th Cir.2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala v.
17 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood, 133
18 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
19 Supreme Court reiterated the rule as follows:

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

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

5 Our rule is that a state prisoner has not "fairly
6 presented" (and thus exhausted) his federal claims
7 in state court unless he specifically indicated to
8 that court that those claims were based on federal law.
9 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
10 2000). Since the Supreme Court's decision in Duncan,
11 this court has held that the petitioner must make the
12 federal basis of the claim explicit either by citing
13 federal law or the decisions of federal courts, even
14 if the federal basis is "self-evident," Gatlin v. Madding,
15 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
16 Harless, 459 U.S. 4, 7... (1982), or the underlying
17 claim would be decided under state law on the same
18 considerations that would control resolution of the claim
19 on federal grounds, see, e.g., Hiivala v. Wood, 195
20 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
21 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
22 at 865.

23 ...

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

29 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as
30 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
31 2001).

32 B. Petitioner's Claims

33 Petitioner is an inmate of High Desert State Prison serving
34 a sentence of forty-one years to life for convictions of multiple
35 sexual offenses against children sustained in the Madera County
36 Superior Court in 2007. Petitioner raises the following claims:

37 1) whether pursuant to Cal. Pen. Code § 667.6(d), a mandatory
38 consecutive sentence was required for conviction of aggravated
39 sexual assault of a child (Cal. Pen. Code § 269) despite the
40 crime's not being specified in the governing statute; 2) whether

1 the trial court was required to inquire whether a Spanish-
2 language interpreter was sufficient when the court was on notice
3 that Petitioner's primary language was a Central American Indian
4 language; 3) whether the trial court erred in denying a motion
5 for a new trial after newly discovered evidence revealed that a
6 principal prosecution witness was a serial child abuser, which in
7 turn would have explained how the two victims were able to
8 provide detailed accounts of the facts concerning sexual abuse;
9 4) whether there was sufficient evidence of an attempt where the
10 evidence showed only completed crimes, and the prosecutor elected
11 not to use the completed crimes to support the charge of attempt;
12 5) whether material, exculpatory evidence was suppressed; and
13 6) whether trial and appellate counsel rendered ineffective
14 assistance for failing to raise the issue of suppression of
15 evidence and thereby depriving Petitioner of a key defense.
16 (Pet. 4-5, 7-9, 11.)¹

17 C. Mixed Petition

18 Whether or not Petitioner exhausted his state court remedies
19 concerning all his claims is unclear. However, Petitioner admits
20 that he did not exhaust his fifth and sixth grounds concerning
21 suppression of material, exculpatory evidence and allegedly
22 ineffective assistance of trial and appellate counsel based upon
23 their failure to raise the issue concerning suppression of
24 evidence. (Pet. 9, 11.)

25 Where none of a petitioner's claims has been presented to
26

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

18 The instant petition is at best a mixed petition containing
19 exhausted and unexhausted claims. The Court must dismiss the
20 petition without prejudice unless Petitioner withdraws the
21 unexhausted claims concerning suppression of evidence and the
22 related allegations of ineffective assistance of counsel for
23 failing to challenge the suppression of evidence at the trial and
24 appellate levels.

25 Accordingly, Petitioner will be given an opportunity to
26 withdraw the unexhausted claims.

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28 ///

1 D. Order to Show Cause concerning Exhaustion of
2 Petitioner's Remaining Claims

3 With respect to Petitioner's first through fourth claims, it
4 is not clear whether Petitioner exhausted his state court
5 remedies. Although Petitioner alleges that he raised those
6 claims before the Court of Appeal, Fifth Appellate District
7 (DCA), Petitioner states that other than a direct appeal, no
8 other applications have been filed. (Pet. 4.) He does not state
9 whether he appealed to the highest state court having
10 jurisdiction. (Pet. 6.) Further, it is not clear that
11 Petitioner gave specific notice to the state court that he was
12 raising federal claims and thus gave the state court a full and
13 fair opportunity to hear and remedy those claims. Petitioner
14 does not describe the claims as federal constitutional claims,
15 and he does not specifically describe the state court proceedings
16 in which he raised the claims.

17 Therefore, upon review of the instant petition for writ of
18 habeas corpus, it appears that Petitioner has not fairly
19 presented his claims to the California Supreme Court.

20 If a claim was not fairly presented to the California
21 Supreme Court, and if at least one exhausted claim remains in the
22 petition, then the unexhausted claim or claims must be withdrawn
23 from the petition, and the Court may proceed on the exhausted
24 claim or claims.

25 If Petitioner has not presented all of his claims to the
26 California Supreme Court, this Court cannot proceed to the merits
27 of those claims. 28 U.S.C. § 2254(b)(1). It is possible,
28 however, that Petitioner has presented his claims to the

1 California Supreme Court but has simply neglected to inform this
2 Court.

3 Thus, Petitioner must inform the Court if his claims have
4 been presented to the California Supreme Court, and, if possible,
5 provide the Court with a copy of the petition or other
6 application filed in the California Supreme Court, along with a
7 copy of any ruling made by the California Supreme Court. Without
8 knowing what precise claims have been presented to the California
9 Supreme Court, the Court is unable to proceed to the merits of
10 the petition.

11 Petitioner will be given an opportunity to show cause why
12 the petition should not be dismissed for failure to exhaust state
13 remedies.

14 III. Disposition

15 Accordingly, it is ORDERED that:

16 1) Petitioner is GRANTED thirty (30) days from the date of
17 service of this order to file a motion to withdraw the
18 unexhausted claims. In the event Petitioner does not file such a
19 motion, the Court will assume Petitioner desires to return to
20 state court to exhaust the unexhausted claims and will therefore
21 dismiss the Petition without prejudice;² and

22
23 ² Petitioner is informed that a dismissal for failure to exhaust will
24 not itself bar him from returning to federal court after exhausting his
25 available state remedies. However, this does not mean that Petitioner will
26 not be subject to the one-year statute of limitations imposed by 28 U.S.C. §
27 2244(d). Although the limitations period is tolled while a properly filed
28 request for collateral review is pending in state court, 28 U.S.C. §
2244(d) (2), it is not tolled for the time an application is pending in federal
court. Duncan v. Walker, 533 U.S. 167, 172 (2001).

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

28 [I]n the habeas corpus context it would be appropriate
for an order dismissing a mixed petition to instruct an
applicant that upon his return to federal court he is to

1 2) Petitioner is ORDERED to show cause why all claims in the
2 petition should not be dismissed for Petitioner's failure to
3 exhaust state remedies. Petitioner is ORDERED to inform the
4 Court what claims have been presented to the California Supreme
5 Court within thirty (30) days of the date of service of this
6 order.

7 Petitioner is forewarned that failure to follow this order
8 will result in dismissal of the petition pursuant to Local Rule
9 110.

10
11 IT IS SO ORDERED.

12 **Dated: November 23, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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24 _____
25 bring only exhausted claims. See Fed. Rules Civ. Proc. 41(a)
26 and (b). Once the petitioner is made aware of the exhaustion
27 requirement, no reason exists for him not to exhaust all potential
28 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.