

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ISIDRO CASTRO,	)	1:11-cv-00441-SKO-HC
	)	
Petitioner,	)	ORDER DIRECTING PETITIONER TO
	)	WITHDRAW HIS UNEXHAUSTED CLAIM
v.	)	WITHIN THIRTY (30) DAYS OF
	)	SERVICE OR SUFFER DISMISSAL OF
	)	THE ACTION
B. M. CASH, Warden,	)	
	)	DEADLINE: THIRTY (30) DAYS
Respondent.	)	
	)	
	)	

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on August 12, 2011 (doc. 13). Pending before the Court is the petition, which was filed on March 16, 2011, and a document filed by Petitioner on September 9, 2011, in response to the Court's order for additional information.

1           I.   Screening the Petition

2           Rule 4 of the Rules Governing § 2254 Cases in the United  
3 States District Courts (Habeas Rules) requires the Court to make  
4 a preliminary review of each petition for writ of habeas corpus.  
5 The Court must summarily dismiss a petition "[i]f it plainly  
6 appears from the petition and any attached exhibits that the  
7 petitioner is not entitled to relief in the district court...."  
8 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
9 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
10 1990). Habeas Rule 2(c) requires that a petition 1) specify all  
11 grounds of relief available to the Petitioner; 2) state the facts  
12 supporting each ground; and 3) state the relief requested.  
13 Notice pleading is not sufficient; rather, the petition must  
14 state facts that point to a real possibility of constitutional  
15 error. Rule 4, Advisory Committee Notes, 1976 Adoption;  
16 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
17 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition  
18 that are vague, conclusory, or palpably incredible are subject to  
19 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th  
20 Cir. 1990).

21           Further, the Court may dismiss a petition for writ of habeas  
22 corpus either on its own motion under Habeas Rule 4, pursuant to  
23 the respondent's motion to dismiss, or after an answer to the  
24 petition has been filed. Advisory Committee Notes to Habeas Rule  
25 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
26 (9th Cir. 2001).

27           II.   Background

28           Petitioner alleged that he was an inmate of the California

1 State Prison at Lancaster, California, serving a sentence of  
2 seventeen (17) years to life imposed in the Kern County Superior  
3 Court upon Petitioner's conviction after jury trial of having  
4 violated Cal. Pen. Code §§ 459, 288(A)(c)(2), 273, and 273.6(A).  
5 Petitioner expressly raises the following claims concerning the  
6 proceedings in the trial court: 1) erroneous or incomplete  
7 instructions concerning consideration of prior acts of misconduct  
8 violated Petitioner's right to due process of law under the  
9 Fourteenth Amendment (pet 9, 18-26); 2) the evidence of  
10 Petitioner's intent to commit oral copulation at the time of  
11 entry of the structure was insufficient to support a conviction  
12 of burglary, and thus Petitioner's right to due process of law  
13 under the Fourteenth Amendment was violated (id. at 27-31); and  
14 3) entry of the livingroom from the bedroom of a single family  
15 residence with the intent to commit forcible oral copulation was  
16 not sufficient to support a conviction of burglary in violation  
17 of Cal. Pen. Code § 459 (id. at 31-38).

18 The Court notes that all three of these claims appear in the  
19 copy of the petition for hearing filed by Petitioner in the  
20 California Supreme Court. (Pet. 44-70.) It thus appears that  
21 Petitioner has demonstrated that he exhausted his state court  
22 remedies as to these claims.

23 Although Petitioner listed only three issues as the grounds  
24 raised in the body of the petition (pet. 4-5, 7-39), following  
25 the petition form and an attached copy of Petitioner's petition  
26 for review in the California Supreme Court is a letter to the  
27 "CLERK OF THE U S DISTRICT" in which Petitioner refers to his  
28 trial attorney, Robert Dowd, as having done "A COUPLE OF THINGS

1 HE SHOULD OF (sic) NOT DONE. FALLING SLEEP AT COURT AND A FEW  
2 OTHER THINGS." (Pet. 74-75.) Further, Petitioner attaches  
3 unauthenticated pages of what appear to be transcripts of trial  
4 court proceedings concerning Mr. Dowd's having fallen asleep for  
5 ten or fifteen minutes during instruction of the jury. (Pet. 82-  
6 87.) The pages are not consecutive, so it is impossible to have  
7 a complete picture of the entirety of the proceedings. However,  
8 it appears that there was a colloquy between Petitioner and the  
9 trial court concerning counsel's sleeping in which Petitioner was  
10 offered a new trial, and there was discussion of a motion for a  
11 new trial relating to counsel's sleeping. Petitioner also  
12 attached a letter from appellate counsel, who advised Petitioner  
13 that Petitioner himself would have to raise the issues not raised  
14 by appellate counsel, such as ineffective assistance of counsel.  
15 (Pet. 80-81.)

16 In a previous screening order filed on March 28, 2011, the  
17 Court expressed uncertainty about whether or not Petitioner  
18 intended to raise a claim concerning the ineffective assistance  
19 of trial counsel in his petition. (Doc. 5.) The Court informed  
20 Petitioner that the law required exhaustion of state court  
21 remedies as to each claim and that it appeared that Petitioner  
22 had not exhausted state court remedies as to such a claim. If  
23 Petitioner were raising a claim concerning trial counsel's  
24 ineffective assistance, he would have to allege exhaustion of  
25 such remedies or withdraw the claim if state court remedies had  
26 not been exhausted as to the claim. Petitioner was given thirty  
27 days to inform the Court if he was raising the ineffective  
28 assistance claim, and if he was, to show exhaustion of state

1 remedies as to the claim or why the petition should not be  
2 dismissed for failure to exhaust state remedies if the claim was  
3 unexhausted. (Id. at 5-9.)

4 On May 17, 2011, after Petitioner failed to respond to the  
5 Court's order, the Court issued an order to Petitioner to show  
6 cause why the case should not be dismissed for Petitioner's  
7 failure to follow the Court's order. Petitioner sought several  
8 extensions of time within which to respond to the Court's order.  
9 In a request dated August 12, 2011, Petitioner stated that due to  
10 his placement in administrative segregation, he had received some  
11 of his legal materials on July 28, 2011. He further stated:

12 I WILL DO MY BEST TO WORK FROM WHAT I GOT TO RAISE  
13 THE CLAIM TO THE SUPREME COURT OF CALIFORNIA.

14 (Doc. 12, 1.) He then asked for more time to do so. (Id.)  
15 In a previous request for an extension, Petitioner had also  
16 referred needing more time "TO INFORM THE SUPREME COURT  
17 CONCERNING CLAIMS RAISED AND EXHAUSTION OF STATE COURT REMEDIES  
18 PLEASE." (Doc. 10, 1-2.)

19 It thus appeared that Petitioner was seeking not an  
20 extension of time within which to inform this Court whether he  
21 was raising a claim of ineffective assistance of counsel and to  
22 inform the Court of whether or not such a claim had been  
23 presented to the California Supreme Court, but rather a stay of  
24 this action so that Petitioner might exhaust unidentified claims  
25 by presenting them to the California Supreme Court in the future.  
26 By order filed on August 19, 2011, Petitioner's motion for an  
27 extension of time was deemed to be a motion for a stay of the  
28 present proceedings, and due to a lack of information from

1 Petitioner, a stay was denied without prejudice. Petitioner was  
2 informed that he had not yet complied with the Court's order to  
3 inform him if he was raising an ineffective assistance of counsel  
4 claim and whether he had presented it to the Supreme Court.  
5 Because all Petitioner had to do was inform the Court of his  
6 intention to raise the ineffective assistance claim and the  
7 status of his efforts to exhaust state remedies, Petitioner was  
8 given until September 12, 2011, to respond. (Doc. 16.)

9 On September 9, 2011, Petitioner filed a response which  
10 consisted of 1) a copy of his correspondence with the California  
11 Supreme Court concerning Petitioner's attempt to file a complaint  
12 against his attorney; and 2) a letter to the undersigned  
13 Magistrate Judge in which Petitioner stated that he had been  
14 instructed by this Court to inform the Supreme Court if he was  
15 attempting to raise the claim, indicated his uncertainty as to  
16 how to file a verified accusation against his trial attorney, and  
17 asked for instructions as to how to proceed to exhaust his  
18 claim.<sup>1</sup> (Doc. 17.)

19 III. Petitioner's Failure to Exhaust State Court Remedies  
20 as to His Claim of Ineffective Assistance of Trial  
21 Counsel

22 Although Petitioner has not directly informed the Court  
23 regarding whether or not he intends to raise a claim in this  
24 proceeding concerning the ineffective assistance of trial  
25 counsel, the Court concludes that further attempts to obtain a  
26 direct statement concerning his intention in this regard would  
27 cause further delay and, in any event, would be futile. The

---

28 <sup>1</sup>The Court is unable to provide Petitioner with legal advice.

1 Court further concludes from the copy of Petitioner's  
2 correspondence with the California Supreme Court that was  
3 included in Petitioner's most recent response that Petitioner is  
4 attempting to raise in the present proceedings a claim concerning  
5 the ineffective assistance of trial counsel, and that Petitioner  
6 has not exhausted his state judicial remedies by raising the  
7 claim before the California Supreme Court.

8 In summary, Petitioner has raised several claims of trial  
9 error as to which state court remedies have been exhausted.  
10 However, as to Petitioner's claim that his trial counsel was  
11 ineffective for sleeping during the proceedings, Petitioner has  
12 not exhausted his state court remedies.

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

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

1 was given a full and fair opportunity to hear a claim if the  
2 petitioner has presented the highest state court with the claim's  
3 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365  
4 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10  
5 (1992), superceded by statute as stated in Williams v. Taylor,  
6 529 U.S. 362 (2000) (factual basis).

7 Additionally, the petitioner must have specifically told the  
8 state court that he was raising a federal constitutional claim.  
9 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669  
10 (9th Cir.2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala v.  
11 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood, 133  
12 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States  
13 Supreme Court reiterated the rule as follows:

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

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.





1 IV. Order to Withdraw Unexhausted Claim or Suffer  
2 Dismissal of the Petition

3 Accordingly, it is hereby ORDERED that Petitioner is GRANTED  
4 thirty (30) days from the date of service of this order to file a  
5 motion to withdraw the unexhausted claim concerning the  
6 ineffective assistance of trial counsel. In the event Petitioner  
7 does not file such a motion, the Court will assume Petitioner  
8 desires to return to state court to exhaust the unexhausted  
9 claims and will therefore dismiss the Petition without  
10 prejudice.<sup>2</sup>

11 IT IS SO ORDERED.

12 **Dated:** November 21, 2011

13 /s/ Sheila K. Oberto  
14 UNITED STATES MAGISTRATE JUDGE

15  
16  
17  
18  
19 <sup>2</sup> Petitioner is informed that a dismissal for failure to exhaust will not  
20 itself bar him from returning to federal court after exhausting his available  
21 state remedies. However, this does not mean that Petitioner will not be  
22 subject to the one-year statute of limitations imposed by 28 U.S.C. § 2244(d).  
23 Although the limitations period is tolled while a properly filed request for  
24 collateral review is pending in state court, 28 U.S.C. § 2244(d)(2), it is not  
25 tolled for the time an application is pending in federal court. Duncan v.  
26 Walker, 533 U.S. 167, 172 (2001).

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

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