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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDGARDO ALONSO,)	1:12-cv-00359-SKO-HC
)	
Petitioner,)	ORDER GRANTING PETITIONER'S
)	MOTION TO AMEND THE PETITION TO
)	CHANGE THE NAME OF RESPONDENT
v.)	(Doc. 8)
)	
M. D. BITER, Warden,)	ORDER DIRECTING THE CLERK TO
)	CHANGE THE NAME OF THE RESPONDENT
Respondent.)	
)	ORDER DISCHARGING ORDER TO SHOW
)	CAUSE (Doc. 7)

ORDER DIRECTING PETITIONER TO
WITHDRAW HIS UNEXHAUSTED CLAIMS
WITHIN THIRTY (30) DAYS OF
SERVICE OR SUFFER DISMISSAL OF
THE ACTION

DEADLINE: THIRTY (30) DAYS

Petitioner is 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 May 22, 2012 (doc. 4).

1 Pending before the Court are 1) Petitioner's motion to amend
2 the petition to name a proper respondent, and 2) Petitioner's
3 response to the Court's order to show cause why the petition
4 should not be dismissed for failure to exhaust state court
5 remedies.

6 I. Motion to Amend the Petition to Name a Respondent

7 Pending before the Court is Petitioner's motion to amend the
8 petition to name a proper respondent, filed on July 13, 2012, in
9 response to the Court's order of April 23, 2012, granting
10 Petitioner leave to file the motion.

11 Petitioner requests that M. D. Biter, Warden of the Kern
12 Valley State Prison where Petitioner is incarcerated, be named as
13 Respondent in this matter.

14 A petitioner seeking habeas relief must name the state
15 officer having custody of him or her as the respondent to the
16 petition. Rule 2(a) of the Rules Governing Section 2254 Cases in
17 the United States District Courts (Habeas Rules); Ortiz-Sandoval
18 v. Gomez, 81 F.3d 891, 894 (9th Cir.1996); Stanley v. California
19 Supreme Court, 21 F.3d 359, 360 (9th Cir.1994). Generally, the
20 person having custody of the prisoner is the warden of the prison
21 because the warden has "day to day control over" the prisoner.
22 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992).
23 Therefore, Petitioner's request will be granted.

24 II. Discharge of the Order to Show Cause

25 On April 23, 2012, the Court issued an order to Petitioner
26 to show cause why the petition should not be dismissed for
27 Petitioner's failure to exhaust state remedies with respect to
28 his claims. The order was served by mail on Petitioner on the

1 same date.

2 On July 13, 2012, after receiving an extension of time to
3 file his response, Petitioner filed a response to the order to
4 show cause which the Court deems timely.

5 Accordingly, the order to show cause will be discharged.

6 III. Failure to Exhaust State Court Remedies as to Some
7 Claims

8 A. Background

9 Petitioner alleges that he is an inmate of the Kern Valley
10 State Prison (KVSP) serving a sentence of fifty-four years to
11 life imposed in the Tulare County Superior Court in June 2009 for
12 attempted murder with gang and gun enhancements. (Pet. 2.)
13 Petitioner raised the following claims in the petition: 1) the
14 trial court abused its discretion in denying Petitioner's motion
15 to sever counts 1 and 2 from counts 3 through 7 because counts 3
16 through 7 were not eligible for joinder under Cal. Pen. Code
17 § 954; 2) the failure to sever and the introduction of
18 inflammatory gang predicate evidence violated Petitioner's right
19 to due process and a fair trial; 3) the prosecutor committed
20 prejudicial misconduct by vouching for two key prosecution
21 witnesses and impeaching a defense witness with a non-existent
22 criminal offense, which violated Petitioner's Fourteenth
23 Amendment right to due process and a fair trial; 4) trial
24 counsel's failure to impeach witness Rodriguez with prior
25 convictions, request an instruction limiting use of the evidence
26 of gang activity, object to the court's directions regarding gang
27 expert testimony, object on the basis of due process and pursuant
28 to Cal. Evid. Code § 352 to predicate crime gang evidence,

1 request an in-custody protective instruction, object and request
2 admonitions concerning various instances of prosecutorial
3 misconduct, impeach witness Rodriguez with prior convictions,
4 request a prophylactic gang evidence instruction, object to
5 unspecified, related misinstructions, challenge inflammatory gang
6 evidence, and request an instruction to prevent diminution of the
7 presumption of innocence all constituted prejudicial, ineffective
8 assistance of counsel; 5) incorrect instructions on imperfect
9 self-defense violated Petitioner's Fourteenth Amendment right to
10 due process and a fair trial; and 6) cumulative prejudice from
11 the matters forming the substance of many of the aforementioned
12 claims violated Petitioner's right to due process of law. (Pet.
13 3-12.)

14 The Court notes that Petitioner's first claim was dismissed
15 without leave to amend as a state law claim.

16 In the order to show cause, the Court noted that with
17 respect to exhaustion, Petitioner alleges he presented the
18 following issues to the California Supreme Court: 1) abuse of
19 discretion by the trial court; 2) insufficient defense counsel;
20 and 3) prosecutorial misconduct. (Pet. 13.) It thus appears
21 from the petition that Petitioner did not raise the claims
22 concerning instructional error and cumulative error, although
23 Petitioner's allegations are not sufficiently precise to be
24 understood with certainty.

25 In his response to the order to show cause, Petitioner
26 states that he failed to exhaust state court remedies with
27 respect to the second claim concerning a violation of due process
28 and the right to a fair trial by the failure to sever or

1 bifurcate gang evidence, the fifth claim concerning instructional
2 error with respect to imperfect self-defense, and the sixth claim
3 concerning cumulative prejudice from a combination of some of the
4 other errors. (Response, doc. 9, 2-3.) Petitioner admits that
5 his petition is a "mixed" petition containing some unexhausted
6 claims and some claims as to which state court remedies were
7 exhausted.

8 Petitioner requests that the Court either dismiss the
9 petition without prejudice to give Petitioner an opportunity to
10 exhaust the unexhausted claims, or give Petitioner an opportunity
11 to amend the petition to delete the unexhausted claims and permit
12 review of the properly exhausted claims. (Id. at 2-3.)

13 B. Legal Standards

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

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

1 1996). A federal court will find that the highest state court
2 was given a full and fair opportunity to hear a claim if the
3 petitioner has presented the highest state court with the claim's
4 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
5 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
6 (1992), superceded by statute as stated in Williams v. Taylor,
7 529 U.S. 362 (2000) (factual basis).

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

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

1 in state court unless he specifically indicated to
2 that court that those claims were based on federal law.
3 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
4 2000). Since the Supreme Court's decision in Duncan,
5 this court has held that the petitioner must make the
6 federal basis of the claim explicit either by citing
7 federal law or the decisions of federal courts, even
8 if the federal basis is "self-evident," Gatlin v. Madding,
9 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
10 Harless, 459 U.S. 4, 7... (1982), or the underlying
11 claim would be decided under state law on the same
12 considerations that would control resolution of the claim
13 on federal grounds, see, e.g., Hiivala v. Wood, 195
14 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
15 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
16 at 865.

17 ...
18 In Johnson, we explained that the petitioner must alert
19 the state court to the fact that the relevant claim is a
20 federal one without regard to how similar the state and
21 federal standards for reviewing the claim may be or how
22 obvious the violation of federal law is.

23 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as
24 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
25 2001).

26 Where none of a petitioner's claims has been presented to
27 the highest state court as required by the exhaustion doctrine,
28 the Court must dismiss the petition. Raspberry v. Garcia, 448
F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
481 (9th Cir. 2001). Further, where some claims are exhausted
and others are not (i.e., a "mixed" petition), the Court must
dismiss the petition without prejudice to give Petitioner an
opportunity to exhaust the claims if he can do so. Rose, 455
U.S. at 510, 521-22; Calderon v. United States Dist. Court
(Gordon), 107 F.3d 756, 760 (9th Cir. 1997), en banc, cert.
denied, 118 S.Ct. 265 (1997); Greenawalt v. Stewart, 105 F.3d
1268, 1273 (9th Cir. 1997), cert. denied, 117 S.Ct. 1794 (1997).
However, the Court must give a petitioner an opportunity to amend

1 a mixed petition to delete the unexhausted claims and permit
2 review of properly exhausted claims. Rose v. Lundy, 455 U.S. at
3 520; Calderon v. United States Dist. Ct. (Taylor), 134 F.3d 981,
4 986 (9th Cir. 1998), cert. denied, 525 U.S. 920 (1998); James v.
5 Giles, 221 F.3d 1074, 1077 (9th Cir. 2000).

6 C. Analysis

7 The instant petition is a mixed petition containing
8 exhausted and unexhausted claims. The Court must dismiss the
9 petition without prejudice unless Petitioner withdraws the
10 unexhausted claims and proceeds with the exhausted claims in lieu
11 of suffering dismissal.

12 IV. Disposition

13 Accordingly, it is ORDERED that:

14 1) Petitioner's motion for leave to amend the petition to
15 name M. D. Biter, Warden, as Respondent in this matter is
16 GRANTED; and

17 2) The Clerk of Court is DIRECTED to change the name of
18 Respondent to "M. D. Biter, Warden"; and

19 3) The order to show cause that issued on April 23, 2012, is
20 DISCHARGED; and

21 4) Petitioner is GRANTED thirty (30) days from the date of
22 service of this order to file a motion to withdraw the
23 unexhausted claims. In the event Petitioner does not file such a
24 motion, the Court will assume Petitioner desires to return to

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1 state court to exhaust the unexhausted claims and will therefore
2 dismiss the petition without prejudice.¹

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6 IT IS SO ORDERED.

7 **Dated: November 6, 2012**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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17 _____
18 ¹Petitioner is informed that a dismissal for failure to exhaust will not
19 itself bar him from returning to federal court after exhausting his available
20 state remedies. However, this does not mean that Petitioner will not be
21 subject to the one-year statute of limitations imposed by 28 U.S.C. § 2244(d).
22 Although the limitations period is tolled while a properly filed request for
23 collateral review is pending in state court, 28 U.S.C. § 2244(d)(2), it is not
24 tolled for the time an application is pending in federal court. Duncan v.
25 Walker, 533 U.S. 167, 172 (2001).

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Petitioner is further informed that the Supreme Court has held in
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.