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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
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10 JOSE LUIS MUNGUIA,

11 Petitioner,

12 v.

13 JIM ROBERTSON,

14 Respondent.

Case No. 1:18-cv-00743-AWI-SAB-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT'S MOTION TO
DISMISS AND ALLOW PETITIONER TO
PROCEED WITH EXHAUSTED CLAIMS

(ECF No. 12)

15
16 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
17 pursuant to 28 U.S.C. § 2254.

18 **I.**

19 **BACKGROUND**

20 On May 31, 2018, Petitioner filed the instant federal petition for writ of habeas corpus.
21 (ECF No. 1). In the petition, Petitioner challenges his 2014 Kern County Superior Court
22 conviction for first-degree burglary. Petitioner asserts the following claims for relief: (1) the
23 evidence was insufficient to support the first-degree burglary conviction on the basis that the
24 house was not an inhabited dwelling; (2) the erroneous admission of Petitioner's prior burglary
25 conviction; (3) the evidence was insufficient as a matter of law to support the jury's true finding
26 of the "person present" allegation; (4) instructional error; and (5) ineffective assistance of trial
27 counsel for failure to request a more detailed jury instruction. (ECF No. 1 at 4–6).¹

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 On July 31, 2018, Respondent filed a motion to dismiss the petition as it contains
2 unexhausted claims. (ECF No. 12). On August 20, 2018, Petitioner filed his response to the
3 motion to dismiss along with an amended petition. (ECF No. 15).

4 II.

5 DISCUSSION

6 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
7 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
8 on comity to the state court and gives the state court the initial opportunity to correct the state's
9 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
10 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
11 providing the highest state court with a full and fair opportunity to consider each claim before
12 presenting it to the federal court. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
13 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

14 Respondent has lodged state court records that demonstrate Petitioner only presented
15 claims 1 and 3 to the California Supreme Court. (LD² 5). In his response, Petitioner agrees that
16 only two of the claims raised in his federal habeas petition were presented to the California
17 Supreme Court. (ECF No. 15 at 2). Given that Petitioner has not sought relief in the California
18 Supreme Court on the remainder of his claims, this Court cannot proceed to the merits of said
19 claims. 28 U.S.C. § 2254(b)(1).

20 Petitioner has presented the Court with a mixed petition containing both exhausted and
21 unexhausted claims. The Ninth Circuit has “repeatedly warned the district courts that they ‘may
22 not dismiss a mixed petition without giving the petitioner the opportunity to delete the
23 unexhausted claims.’” Dixon v. Baker, 847 F.3d 714, 719 (9th Cir. 2017) (quoting Valerio v.
24 Crawford, 306 F.3d 742, 770 (9th Cir. 2002)). See Rhines v. Weber, 544 U.S. 269, 278 (2005)
25 (“[I]f a petitioner presents a district court with a mixed petition and the court determines that stay
26 and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted
27 claims and to proceed with the exhausted claims if dismissal of the entire petition would

28 ² “LD” refers to the documents lodged by Respondent on July 31, 2018. (ECF No. 13).

1 unreasonably impair the petitioner's right to obtain federal relief.”). Here, Petitioner “requests
2 that this Court proceed forward in adjudicating the merits of his exhausted claims only.” (ECF
3 No. 15 at 3). Petitioner also has filed a first amended petition containing only the two exhausted
4 claims. (ECF No. 15 at 4–10).

5 **III.**

6 **RECOMMENDATION**

7 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

- 8 1. Respondent’s motion to dismiss (ECF No. 12) be GRANTED; and
9 2. Petitioner be allowed proceed with the fully exhausted first amended petition.

10 This Findings and Recommendation is submitted to the assigned United States District
11 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
12 Rules of Practice for the United States District Court, Eastern District of California. Within
13 **THIRTY (30)** days after service of the Findings and Recommendation, any party may file
14 written objections with the court and serve a copy on all parties. Such a document should be
15 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
16 objections shall be served and filed within fourteen (14) days after service of the objections. The
17 assigned United States District Court Judge will then review the Magistrate Judge’s ruling
18 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
19 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.
20 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
21 Cir. 1991)).

22 IT IS SO ORDERED.

23 Dated: August 31, 2018

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26 UNITED STATES MAGISTRATE JUDGE
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