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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KENNETH JAMES WEST,

 Petitioner,

 v.

ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,

 Respondent.

Case No. 1:22-cv-00172-ADA-CDB (HC)

FINDINGS AND RECOMMENDATIONS THAT
RESPONDENT’S MOTION TO DISMISS BE
GRANTED AND DISMISSING WITHOUT
PREJUDICE PETITIONER’S FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

(ECF Nos. 14, 19)

**OBJECTIONS, IF ANY, DUE WITHIN
TWENTY ONE DAYS**

On February 7, 2022, Petitioner Kenneth James West (“Petitioner”) a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus. (ECF No. 1). On March 15, 2022, Petitioner filed a first amended petition for writ of habeas corpus. (ECF No. 14). On July 22, 2022, Respondent filed a motion to dismiss the petition because the claims are unexhausted.¹ (ECF No. 19). On August 11, 2022, Petitioner filed a response opposing Respondent’s motion to dismiss. (ECF No. 22). For the reasons set forth below, the Court will recommend that Respondent’s motion to dismiss be granted without prejudice, and that Petitioner be given 30 days to file a second amended petition.

¹ Respondent notes “Petitioner is incarcerated at Valley State Prison, where Landon Bird is the Warden” and the appropriate respondent. (ECF No. 19 at 1). *See Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam) (Generally, the person having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has “day-to-day control over” the petitioner and thus can produce “the body of the petitioner.”))

1 **Procedural and Factual Background**

2 On May 21, 2018, Petitioner was convicted in Fresno County Superior Court for multiple sex
3 offenses against minors. (ECF No. 14 at 1); (Lod. Doc. 1); *see* Cal. Pen. Code § 288. On August 6,
4 2018, Petitioner was sentenced to an indeterminate state prison term of 165 years to life. (ECF No. 14
5 at 1); (Lod. Doc. 1).

6 Petitioner appealed the judgment of the trial court on the grounds that it violated the *ex post*
7 *facto* clauses of the United States and California Constitutions, the trial court erroneously imposed
8 consecutive sentences upon Petitioner, and in the alternative, Petitioner had received ineffective
9 assistance of counsel for his trial counsel’s failure to object to consecutive terms. (Lod. Doc. 2). On
10 December 11, 2020, the California Court of Appeal affirmed the judgment. (Lod. Doc. 5). Petitioner
11 sought a petition for review to exhaust state remedies to the Supreme Court of California. (Lod. Doc.
12 6). Again, Petitioner argued the judgment violated the *ex post facto* clauses of the United States and
13 California Constitutions, the trial court erroneously imposed consecutive sentences upon Petitioner,
14 and in the alternative, Petitioner had received ineffective assistance of counsel for his trial counsel’s
15 failure to object to consecutive terms. *Id.* On February 24, 2021, the California Supreme Court
16 denied the petition for review. (Lod. Doc. 7).

17 Petitioner states he did not file any state post-conviction collateral challenges related to his
18 state conviction and sentence. (ECF No. 14 at 2). On February 7, 2022, Petitioner filed his initial
19 federal petition for writ of habeas corpus. (ECF No. 1). On March 15, 2022, Petitioner filed an
20 amended petition. (ECF No. 14). On July 22, 2022, Respondent filed the instant motion to dismiss
21 asserting the claims in Petitioner’s federal petition are unexhausted. (ECF No. 19). On August 11,
22 2022, Petitioner filed a response to Respondent’s motion to dismiss arguing he did exhaust all state
23 remedies. (ECF No. 22). Accordingly, Respondent’s motion is ripe for resolution.

24 **Petitioner’s Claims**

25 Petitioner first argues his custody is unlawful because he was denied his Sixth Amendment
26 right to effective assistance of counsel. (ECF No. 14 at 4). Petitioner claims his counsel refused to
27 subpoena witnesses “important to defense,” did not call witnesses set to testify, and “refused to
28 discredit and/or impeach a witness that is a 2-strike [*sic*] felon and charged with DUI hit and run.” *Id.*

1 at 5. Further, Petitioner claims his counsel “refused to use 2 investigator [*sic*] reports in defenses
2 favor”, did not allow Petitioner to testify “about key points” and refused to object to the sentence or
3 restitution imposed. *Id.* Petitioner also asserts he entered two *Marsden* motions and a bar association
4 complaint against his counsel but all three were denied. *Id.*

5 Next, Petitioner claims the sentencing court imposed a “gross and unfair sentence” in violation
6 of the Eighth Amendment. *Id.* at 4. Petitioner asserts the trial court did not use its discretion in
7 sentencing, imposed an override of the “statute of limitations” on his counts and enhancements, and
8 inflicted an “unaffordable” restitution fine that prevented him from being able to pay for private
9 counsel. *Id.*

10 Petitioner also contends his custody is unlawful because he was denied his Fourteenth
11 Amendment right to equal protection under the law. *Id.* at 6. Petitioner claims “this case was founded
12 on no evidence scientific, no eyewitnesses [*sic*] or otherwise to support any of the alleged complaints.”
13 *Id.* Petitioner argues he is serving 165 years to life for a crime he did not commit and that he did not
14 receive a fair trial. *Id.*

15 **Standard of Review**

16 A federal court may entertain a petition for writ of habeas corpus from a person in custody
17 pursuant to the judgment of a state court if they allege the custody is in violation of the Constitution or
18 laws or treaties of the United States. 28 U.S.C. §§ 2254(a), 2241(c)(3). Rule 4 of the Rules Governing
19 Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition
20 and any attached exhibits that the petitioner is not entitled to relief in the district court...” Habeas Rule
21 4.

22 The Ninth Circuit permits a respondent to move to dismiss in lieu of an answer if the motion
23 attacks the pleadings for failing to exhaust state remedies or being in violation of the state’s procedural
24 rules. *See, e.g., O’Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (using Habeas Rule 4 to evaluate
25 a motion to dismiss habeas petition for failure to exhaust state remedies); *White v. Lewis*, 874 F.2d 599,
26 602-03 (9th Cir. 1989) (using Habeas Rule 4 as procedural grounds to review a motion to dismiss for
27 state procedural default). Thus, a respondent can file a motion to dismiss after the court orders a
28 response, and the Court should use Habeas Rule 4 standards to review the motion. *White*, 874 F.2d at

1 602-03; *Hillery v. Pulley*, 533 F. Supp. 1189, 1194, n.12 (E.D. Cal. 1982) (“a motion to dismiss attacking
2 only the pleadings should be considered under Rule 4 standards”). A petition for habeas corpus should
3 not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded
4 were such leave to be granted. *Jarvis v. Nelson*, 440 F.2d 13, 14 (9th Cir. 1971) (per curiam).

5 **Discussion**

6 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
7 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1);
8 *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The exhaustion doctrine is based on comity to the state
9 court and gives the state court the initial opportunity to correct the state’s alleged constitutional
10 deprivations. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518
11 (1982).

12 A petitioner can satisfy the exhaustion requirement by providing the highest state court with
13 the necessary jurisdiction a full and fair opportunity to consider each claim before presenting it to the
14 federal court or demonstrating that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828,
15 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)); *See e.g., Ybarra v. McDaniel*,
16 656 F.3d 984, 991 (9th Cir. 2011) (the Nevada Supreme Court did have an opportunity to address
17 Ybarra’s venue claim, thus the claim had been exhausted). The state courts must be presented with the
18 specific federal constitutional guarantee at issue and a statement of the operative facts that support the
19 federal legal theory. *Gentry v. Sinclair*, 705 F.3d 884, 897, 901 (9th Cir. 2013).

20 Respondent contends that none of the claims in his amended petition have been exhausted.
21 (ECF No. 19 at 2). Respondent argues that Petitioner’s petition for review in the California Supreme
22 Court only raised two issues: “an ex post facto violation and sentencing error under California’s one
23 strike law.” *Id.* Respondent claims Petitioner did not provide to the California Supreme Court any of
24 the claims he now raises in his amended petition: ineffective assistance of counsel, gross and unfair
25 sentence under the Eighth Amendment, and an equal protection violation under the Fourteenth
26 Amendment. *Id.*

27 The Court agrees with Respondent’s conclusion that Petitioner failed to exhaust his Eighth and
28 Fourteenth Amendment claims. Several of Petitioner’s ineffective assistance of counsel claims are

1 also unexhausted. Petitioner has not argued before the highest state court his trial counsel failed to
2 subpoena and call witnesses, failed to discredit and/or impeach a witness, failed to use certain
3 evidence, and failed to let Petitioner testify. Thus, those claims must also be dismissed.

4 However, Petitioner’s asserted first ground for relief is his trial counsel’s ineffective assistance,
5 which Petitioner alleges was a claim he presented to the California Supreme Court, and which
6 Petitioner supports in the first amended petition with an allegation that his trial counsel “refused to
7 object to sentence or restitution imposed.” (ECF No. 14 at 3-6). In fact, Petitioner’s California
8 Supreme Court petition asserted his trial counsel failed to object to the trial court’s misunderstanding
9 of its discretionary authority to sentence Petitioner concurrently. (Lod. Doc. 6 at 20-21). The petition
10 for review also claimed the trial counsel’s failure to argue for concurrent terms, “rendered his
11 representation ineffective because there is a reasonable probability that his sentence would have been
12 more favorable if counsel had raised the objection.” *Id.* at 23 (citing *Strickland v. Washington*, 466
13 U.S. 668, 691-94, 697 (1984)). Therefore, Petitioner did exhaust in the highest state court an
14 ineffective assistance of counsel claim regarding his trial counsel’s failure to object and argue for
15 concurrent terms.

16 Petitioner has exhausted in the highest state court one of his ineffective assistance of counsel
17 claims. However, Petitioner’s amended petition contains only a generalized claim that counsel
18 “refused to object to the sentence” and fails to state a cognizable federal claim. (ECF No. 14 at 4).
19 “Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas
20 relief.” *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *see Blackledge v. Allison*, 431 U.S. 63, 75 n.7
21 (1977) (notice pleading is insufficient, a petitioner must state sufficient facts); *see also* Habeas Rule
22 2(c) (“the petition shall specify all of the grounds for relief...and shall set forth in summary form the
23 facts supporting each of the grounds thus specified”). Petitioner has failed to provide within his
24 federal habeas petition specific facts that support his claim for ineffective assistance of counsel.
25 Therefore, Petitioner’s claim must be dismissed for failure to state a claim.

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1 **Conclusion and Recommendations**

2 Petitioner’s federal petition for writ of habeas corpus is deficient for advancing claims that are
3 wholly unexhausted and for asserting an exhausted claim that is not sufficiently pled.² Petitioner
4 should be granted an opportunity to file an amended petition curing the aforementioned deficiencies.

5 Based on the foregoing, the Court HEREBY RECOMMENDS that:

- 6 1. Respondent’s motion to dismiss (ECF No. 19) is GRANTED;
- 7 2. Petitioner’s First Amended Petition for Writ of Habeas Corpus (ECF No. 14) be
8 DISMISSED WITHOUT PREJUDICE for failure to show exhaustion of state remedies and
9 failure to state a cognizable federal claim; and
- 10 3. Petitioner be provided thirty days from the date of service of the order adopting these
11 findings and recommendations to file a Second Amended Petition.

12 These findings and recommendations will be submitted to the United States district judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one (21) days
14 after being served with these findings and recommendations, Petitioner may file written objections
15 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
16 Recommendations.” Plaintiffs are advised that failure to file objections within the specified time may
17 result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)
18 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991).

19 IT IS SO ORDERED.

20 Dated: November 30, 2022

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23 UNITED STATES MAGISTRATE JUDGE
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28 ² In addition, the Court takes notice Petitioner argued and exhausted an ex post facto claim against his sentence but chose not to raise it in his federal petition. (Lod. Doc. 6).