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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRITZ ALFREDO ERHARDT,  
Petitioner,  
v.  
RAYTHEL FISHER, JR.,  
Respondent.

No. 2:16-cv-1002 JAM KJN P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding pro se, with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 6, 2016, respondent filed a motion to dismiss, alleging that the petition contains a claim of ineffective assistance of counsel which is unexhausted. Petitioner did not file an opposition to the motion. On November 16, 2016, petitioner was ordered to show cause, within thirty days, why his failure to oppose respondent's motion to dismiss should not be deemed a waiver of any opposition to the granting of the motion, and ordered him to file an opposition. In addition, petitioner was informed of the two procedures for seeking a stay and abeyance, and given thirty days in which to notify the court how he wishes to proceed. (ECF No. 14 at 4.) Petitioner was cautioned that failure to timely respond would result in an order granting the motion to dismiss, and the action would proceed solely on petitioner's exhausted claims one through three. (ECF No. 14 at 5.)

1 Thirty days have now passed, and plaintiff has not filed an opposition to the motion to  
2 dismiss, a motion for stay, or otherwise responded to the order to show cause. Good cause  
3 appearing, respondent's motion to dismiss should be granted, and petitioner's fourth claim should  
4 be stricken from the petition based on petitioner's failure to exhaust state court remedies.

## 5 II. Procedural History

6 Following jury trial, petitioner was convicted in the El Dorado County Superior Court on  
7 two counts of lewd and lascivious acts upon a child under fourteen years old, and one count of  
8 continuous sexual abuse of a child. Petitioner was sentenced to sixteen years in state prison.

9 On November 20, 2014, petitioner's conviction was affirmed. The California Court of  
10 Appeal for the Third Appellate District found that (a) the trial court abused its discretion by  
11 denying admission of lay opinion testimony that petitioner's character was inconsistent with  
12 being a sexual deviant, but found the error was not prejudicial; (b) the trial court did not abuse its  
13 discretion by denying petitioner's second application to have a second psychiatric evaluation for  
14 trial; (c) there was no cumulative error; and (d) the trial court did not abuse its discretion in  
15 denying petitioner probation. (Respondent's Lodged Documents ("LD") No. 1.)

16 Petitioner filed a petition for review in the California Supreme Court which was denied on  
17 February 11, 2015. (LD Nos. 2-3.)

18 On May 11, 2016, the instant federal petition was filed. (ECF No. 1.)

## 19 III. Legal Standards

20 The exhaustion of state court remedies is a prerequisite to the granting of a petition for  
21 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived  
22 explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver of exhaustion, thus, may  
23 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the  
24 highest state court with a full and fair opportunity to consider all claims before presenting them to  
25 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d  
26 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

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27 <sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C.  
28 § 2254(b)(2).

1 The state court has had an opportunity to rule on the merits when the petitioner has fairly  
2 presented the claim to that court. The fair presentation requirement is met where the petitioner  
3 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at  
4 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were  
5 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.  
6 Harless, 459 U.S. 4, 6 (1982). Instead,

7 [i]f state courts are to be given the opportunity to correct alleged  
8 violations of prisoners’ federal rights, they must surely be alerted to  
9 the fact that the prisoners are asserting claims under the United  
10 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.

11 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus  
12 must include reference to a specific federal constitutional guarantee, as well as a statement of the  
13 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 153 (1996). The  
14 United States Supreme Court has held that a federal district court may not entertain a petition for  
15 habeas corpus unless the petitioner has exhausted state remedies with respect to each of the  
16 claims raised. Rose v. Lundy, 455 U.S. 509 (1982).

#### 17 IV. The Federal Petition

18 Petitioner challenges his state convictions on four grounds:

19 1. The trial court’s error in refusing to admit the lay opinion testimony of his character  
20 trait of not being a sexual deviant was prejudicial error in violation of his right to due process.

21 (ECF No. 1 at 18-19.)

22 2. Trial court violated his Sixth and Fourteenth Amendment Rights to a fair trial, the  
23 effective assistance of counsel and due process by refusing to authorize a second psychiatric  
24 examination. (ECF No. 1 at 20-21.)

25 3. The cumulative effect of trial court errors violated his Fourteenth Amendment right to  
26 due process. (ECF No. 1 at 22-23.)

27 4. Petitioner was denied the effective assistance of counsel at trial for his counsel’s failure  
28 to present his wish to fire the attorney to the trial judge and for failing to present evidence relating

1 to the victim's character and background, all in violation of rights to due process and a fair trial.  
2 (ECF No. 1 at 24.)

3 V. Discussion

4 The petition for review reflects that petitioner raised only the first three issues to the  
5 California Supreme Court. (LD No. 2 at 2-15.) Petitioner did not fairly present his fourth ground  
6 to the California Supreme Court in the petition for review because petitioner did not describe  
7 either the operative facts or the federal legal theory on which his fourth claim is based. Gray, 518  
8 U.S. at 153. Thus, petitioner has not exhausted his state court remedies as to his fourth claim. As  
9 petitioner was warned in the court's order to show cause, this action will now proceed solely on  
10 petitioner's first three claims.

11 VI. Conclusion

12 Accordingly, IT IS HEREBY ORDERED that the order to show cause (ECF No. 14) is  
13 discharged; and

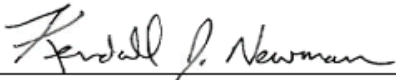
14 IT IS RECOMMENDED that:

- 15 1. Respondent's motion to dismiss (ECF No. 13) be granted;
- 16 2. The Clerk of the Court be directed to strike petitioner's fourth ground from the petition  
17 (ECF No. 1 at 10, 24); and
- 18 3. Respondent be ordered to file a responsive pleading to grounds one through three of  
19 the petition within sixty days from any order by the district court adopting these findings and  
20 recommendations.

21 These findings and recommendations are submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
23 after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,  
26 he shall also address whether a certificate of appealability should issue and, if so, why and as to  
27 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the  
28 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

1 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after  
2 service of the objections. The parties are advised that failure to file objections within the  
3 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
4 F.2d 1153 (9th Cir. 1991).

5 Dated: January 27, 2017

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8 KENDALL J. NEWMAN  
9 UNITED STATES MAGISTRATE JUDGE

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