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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIMIKO KIMIO WILSON,

No. C 11-5207 WHA (PR)

Petitioner,

**ORDER DENYING RESPONDENT'S  
MOTION TO DISMISS; TO SHOW  
CAUSE**

v.

ANTHONY HEDGPETH,

Respondent.

(Docket No. 12)

**INTRODUCTION**

This is a habeas case filed pro se by a state prisoner. Respondent was ordered to show cause why the petition should not be granted based on the thirteen cognizable claims in the petition. Respondent filed a motion to dismiss on the grounds that seven of the claims have not been not exhausted. Petitioner has filed an opposition and respondent has filed a reply brief. Petitioner was granted leave to file a supplemental opposition, and respondent filed a supplemental reply brief. For the reasons set out below, the motion to dismiss is **DENIED** and respondent is ordered to file an answer showing cause why the petition should not be granted.

**STATEMENT**

In 2007, a jury found guilty of two counts of murder with special circumstances and one count of premeditated attempted murder. The trial court sentenced him to concurrent terms of life without the possibility of parole in state prison. On appeal, the California Court of Appeal affirmed the judgment, and the California Supreme Court denied a petition for review. Thereafter, petitioner filed unsuccessful habeas petitions in the state courts, including one

1 petition in the California Supreme Court. The instant federal habeas petition followed

2 **ANALYSIS**

3 The parties agree that petitioner raised his first six claims in his petition for direct  
4 review to the California Supreme Court, and that they have all been exhausted. The remaining  
5 seven claims were raised in a petition for a writ of habeas corpus to the California Supreme  
6 Court. Respondent contends that these claims were not exhausted, and petitioner disagrees.

7 An application for a federal writ of habeas corpus filed by a prisoner who is in state  
8 custody pursuant to a judgment of a state court may not be granted unless the prisoner has first  
9 exhausted state judicial remedies, either by way of a direct appeal or in collateral proceedings,  
10 by presenting the highest state court available with a fair opportunity to rule on the merits of  
11 each and every issue he or she seeks to raise in federal court. *See* 28 U.S.C. 2254(b),(c);  
12 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). The United States Supreme Court held in  
13 *Rose v. Lundy*, 455 U.S. 509 (1982), that federal courts must dismiss a habeas petition which  
14 contains one or more unexhausted claims. *Id.* at 522 (1982).

15 Respondent argues that the seven claims raised presented to the California Supreme  
16 Court in a habeas petition were not exhausted because they were denied with a citation to *In re*  
17 *Swain*, 34 Cal. 2d 300, 304 (1949). *In re Swain* articulates California's procedural requirements  
18 that a California habeas petitioner allege with particularity the facts supporting his claims and  
19 explain and justify any delay in the presentation of the claims. *See In re Swain*, 34 Cal. 2d 300,  
20 304 (1949). The Supreme Court's denial was summary and unexplained, and it was also  
21 unaccompanied by citation to any other case. Hence it is unclear whether the citation to *Swain*  
22 stood for its first proposition, namely a lack of sufficient particularity, or its second proposition,  
23 namely an unjustified delay. *Compare Pombrio v. Hense*, 631 F. Supp. 2d 1247, 1252 (C.D.  
24 Cal. 2009) (holding that when accompanied by citation to *People v. Duvall*, 9 Cal. 4th 464, 474  
25 (1995) (requiring habeas claims to be stated with particularity), citation to *Swain* indicates that  
26 habeas petition being dismissed for lack of particularity). Respondent contends, without any  
27 authority or explanation, that the citation to *Swain* stood for the first proposition – that the  
28 petition did not describe the claims with sufficient particularity. In any event, even if that were

1 the basis for the *Swain* citation, the claims are still exhausted.

2 Where *Swain* is cited for the proposition that the petitioner did not present his claims  
3 with sufficient particularity, the Ninth Circuit treats the *Swain* citation as standing for a denial  
4 on procedural grounds which can be cured in a renewed state petition. See *Kim v. Villalobos*,  
5 799 F.2d 1317, 1319 (9th Cir. 1986). State judicial remedies therefore are not exhausted. See  
6 *id.*; accord *McQuown v. McCartney*, 795 F.2d 807, 808 n.1, 809 (9th Cir. 1986); *Harris v.*  
7 *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974). However, if the petitioner maintains that  
8 the state procedural denial based on *Swain* was erroneous because he did allege his claims with  
9 particularity and that they are incapable of being alleged with any greater particularity, a federal  
10 court cannot per se find the claims unexhausted, and must instead independently examine the  
11 petition presented to the state court to determine whether the claims were fairly presented. See  
12 *Kim*, 799 F.2d at 1319-20.

13 Here, petitioner contends in his opposition and supplemental opposition that the claims  
14 were presented to the California Supreme Court with sufficient particularity to satisfy the  
15 federal “fair presentation” requirement. To “fairly present” a claim for purposes of exhaustion,  
16 a petitioner must provide the state court only with the operative facts “necessary to give  
17 application to the constitutional principle upon which [the petitioner] relies,” *Davis v. Silva*,  
18 511 F.3d 1005, 1009 (9th Cir. 2008) (internal quotations and citations omitted), and cite the  
19 pertinent constitutional right, *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). A review of the  
20 petition to the California Supreme Court shows that it did so. Each of the seven claim identifies  
21 the specific constitutional right at issue and contains a detailed account of how the right was  
22 allegedly violated, including specific citations to the record. Indeed, the petition includes 44  
23 pages of briefing on the seven claims. The claims are, moreover, identical to claims seven  
24 through thirteen raised here. Under these circumstances, the seven claims were “fairly  
25 presented” to the California Supreme Court.

26 Respondent argues first that the Ninth Circuit’s decision in *Kim*, requiring a federal  
27 court to examine whether the petition to the California Supreme Court had sufficient  
28 particularity, was wrongly decided. Recognizing the futility of such an argument because *Kim*

1 is binding on the instant matter, however, respondent also disputes whether petitioner stated his  
2 seven claims to the California Supreme Court with sufficient particularity. Respondent's  
3 arguments in this regard go to the merits of the claims, however, not to whether they were fairly  
4 presented. For example, respondent argues that in some instances petitioner does not  
5 adequately explain how the alleged facts give rise to a constitutional violation, in other  
6 instances the alleged facts do not amount to a constitutional violation, and in other instances  
7 petitioner's explanation for how his rights were violated is inadequate. While these arguments  
8 may ultimately prove true, that would only show that the claims lack merit, not they lacked  
9 sufficient particularity for the state high court to a fair opportunity to rule on them. For the  
10 reasons discussed above, the petition adequately afforded the state court the opportunity to  
11 understand the legal and factual basis for petitioner's claims. As such, the state court had a fair  
12 opportunity to rule on his claims, and they were adequately exhausted for federal habeas  
13 review. Accordingly, the motion to dismiss will be denied and respondent will be ordered to  
14 show cause why the petition should not be granted.

15 **CONCLUSION**

16 In light of the foregoing, respondent's motion to dismiss (document number 12) is  
17 **DENIED.** Respondent shall file with the court and serve on petitioner, within ninety-one days of  
18 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
19 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
20 granted based on the claims found cognizable herein. Respondent shall file with the answer and  
21 serve on petitioner a copy of all portions of the state trial record that have been transcribed  
22 previously and that are relevant to a determination of the issues presented by the petition.

23 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
24 court and serving it on respondent within twenty-eight days of the date the answer is filed.

25 **IT IS SO ORDERED.**

26 Dated: December 10, 2012.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE