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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HENRY PAUL INOCENCIO,

Petitioner,

v.

ANTHONY HEDGPATH, Warden,

Respondent.

No. C 10-2334 PJH

**ORDER RE MOTION  
TO DISMISS AND SETTING  
BRIEFING SCHEDULE**

Petitioner Henry Paul Inocencio ("Inocencio"), a California prisoner, filed a federal habeas petition on May 27, 2010. On November 8, 2010, the state filed a motion to dismiss Inocencio's petition as mixed, containing both exhausted and unexhausted claims. Inocencio filed an opposition, and the state filed a reply, and the motion was fully briefed on December 6, 2010. On September 27, 2011, the case was reassigned to the undersigned judge. Having considered the parties' papers and the relevant legal authority, the court DENIES the state's motion.

**BACKGROUND**

In 2006, an Alameda County Superior Court jury found Inocencio guilty of first degree murder and of being a felon in possession of a firearm pursuant to California Penal Code §§ 187 and 12021(a)(1). The jury also found true allegations that Inocencio personally discharged a firearm causing great bodily injury and that he intentionally fired a handgun from a motor vehicle at another person outside the vehicle. On March 20, 2006, the court sentenced Inocencio to life imprisonment without parole.



1 unexhausted claims.

2 In reply, the state argues that Inocencio did not provide the California Supreme  
3 Court with a sufficient factual basis to decide the claims he presented in his state habeas  
4 petition, and that the claims should be deemed unexhausted for that reason.

5 **B. Analysis**

6 Neither party has specified which claims are at issue in the instant federal habeas  
7 petition, let alone which claim(s) the respective parties contend are exhausted and  
8 unexhausted. Accordingly, in making the determinations relevant to this motion, the court  
9 has reviewed Inocencio's petition before this court, the exhibits to the motion to dismiss,  
10 and has afforded special attention to the issues Inocencio raised on direct appeal and  
11 those that he raised in his habeas petition filed with the California Supreme Court.

12 In addition to requesting an evidentiary hearing, Inocencio raises seven claims in his  
13 federal habeas petition, including that:

- 14 1) he was denied effective assistance of trial counsel under the Sixth  
15 Amendment when his counsel failed to conduct "any meaningful investigation  
16 into the facts of his case, potential defenses, or potential exculpatory  
17 witnesses;"
- 18 2) he was denied effective assistance of appellate counsel under the Sixth  
19 Amendment when his counsel "unjustifiably declined to raise a viable  
20 argument," an ineffective assistance of counsel claim, on direct appeal;
- 21 3) the prosecution improperly vouched for the credibility of its witnesses and  
22 made inappropriate statements disparaging defense witnesses in violation of  
23 his due process and fair trial rights;
- 24 4) his sentence was cruel and unusual and constitutes excessive punishment  
25 under the Eighth Amendment;
- 26 5) his due process and fair trial rights were violated when the prosecution  
27 improperly utilized its peremptory challenges to strike Hispanic jurors;

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- 1           6)     his due process rights were violated when the trial court excluded evidence
- 2                     that someone else was the shooter; and
- 3           7)     his due process rights were violated when the trial court admitted evidence of
- 4                     a confidential communication between a witness and an attorney.

5           The latter three claims, claims five, six, and seven, stated above, were clearly  
6 exhausted in the course of Inocencio’s direct appeal before the state courts. They are not  
7 at issue in the instant motion.

8           Claims one through four are the only claims at issue in the motion to dismiss. They  
9 were raised in the habeas petition that the California Supreme Court denied under *Swain*.  
10 In *Kim v. Villalobos*, the petitioner similarly filed a habeas petition in federal court following  
11 the California Supreme Court's postcard denials of his two state habeas petitions. 799  
12 F.2d at 1319-20. The Ninth Circuit rejected respondent's argument that the federal petition  
13 was unexhausted to the extent that the denial was based on *In re Swain*, 34 Cal.2d at 300,  
14 the same case cited by the California Supreme Court in Inocencio’s case. *Id.* The Ninth  
15 Circuit held that the state court’s citation to that particular portion of the *Swain* decision  
16 indicated that the state court found the petitioner had not presented his claims with  
17 sufficient particularity. *Id.*

18           The *Kim* court went further and set forth a procedure for federal habeas courts’  
19 review or screening of claims denied by the California Supreme Court under *Swain*. *Id.* It  
20 held that the California Supreme Court’s citation of *Swain* does not *per se* establish that a  
21 petitioner has failed to exhaust the claims denied by that court. *Id.* The Ninth Circuit held  
22 that it was “incumbent” on the federal court “in determining whether the federal standard of  
23 ‘fair presentation’ of a claim to the state courts has been met, independently to examine  
24 [the petitioner’s] petition to the California Supreme Court.” *Id.* at 1320. If the federal court  
25 agrees with the petitioner, and determines that the claims were presented to the California  
26 Supreme Court with particularity, or “that they are incapable of being alleged with any  
27 greater particularity,” then the petitioner “would then have fairly presented his claims to the  
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1 state court and would be entitled to pursue them in federal court.” *Id.* The court reasoned  
2 that, “[t]he state courts, by denying a writ for lack of particularity when the claims are  
3 alleged with as much particularity as is practicable, cannot forever preclude the petitioner  
4 from reaching federal court.” *Id.*

5 However, if the federal court reviews the claims and determines that indeed they  
6 were not raised before the California Supreme Court with particularity, then the *Kim* court  
7 noted that “[t]hat deficiency, *when it exists*, can be cured in a renewed petition” to the  
8 California Supreme Court. *Id.* (emphasis added).

9 This court’s independent examination of the claims raised by Inocencio in his  
10 California Supreme Court habeas petition leads the court to conclude that all four of  
11 Inocencio’s claims at issue here were fairly presented in his habeas petition to the state  
12 court.

13 **i. Claim One: Ineffective Assistance of Trial Counsel**

14 In this first claim, Inocencio contended that his trial counsel provided ineffective  
15 assistance of counsel when he: (1) failed to promptly and adequately conduct a pretrial  
16 investigation; (2) subpoena and investigate witnesses; (3) move for a change of venue; and  
17 (4) was biased such that he prejudiced Inocencio’s defense. Inocencio provided nearly four  
18 pages of factual support in addition to the legal support for this claim and sub-claims. For  
19 example, Inocencio named witnesses and evidence, including bullet casings and security  
20 tapes, that his counsel failed to investigate.

21 Accordingly, the court concludes that the claim was fairly presented to the California  
22 Supreme Court and has been properly exhausted.

23 **ii. Claim Two: Ineffective Assistance of Appellate Counsel**

24 In his second claim, Inocencio contended that he made his appellate counsel aware  
25 of the above ineffective assistance of counsel claim prior to the filing of his direct appeal,  
26 and that appellate counsel promised him he would raise the issue, but failed to do so.  
27 Inocencio provided sufficient factual and legal support for this claim as well.

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