UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD JAMES SERVIN,

Petitioner,

v.

D.B. LONG,[1]

Respondent.

No. 2:15-cv-779-JAM-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel in an action brought under 28 U.S.C. § 2254. Respondent moves to dismiss the petition on the grounds that the claims therein have not been properly exhausted, are procedurally defaulted, or are outside the jurisdiction of this court. ECF No. 12. For the reasons that follow, the four claims have been procedurally defaulted and that the fifth fails to state a federal habeas claim. Accordingly, it is recommended that the motion to dismiss be granted.

I. Background

Petitioner challenges a prison disciplinary action taken against him in 2013 for possession of a cell phone. ECF No. 1 at 3. He previously sought habeas relief in the California Supreme Court, the California Court of Appeals, and the Sacramento County Superior Court. ECF Nos.

[1] The court substitutes the warden of petitioner's current institution of incarceration pursuant to Rule 2(a) of the Rules Governing Habeas Corpus Cases Under § 2254.

12-3, 12-4, 12-5, & 12-6. The two appellate courts denied the petitions summarily, while the superior court provided a reasoned opinion. ECF No. 1 at 26-30. In that opinion, the court found that petitioner had failed to administratively exhaust four of the five asserted grounds for relief, in contravention of California law. ECF No. 1 at 27-28. The court rejected the fifth ground on the merits. *Id.* at 28-29.

II. The Motion to Dismiss

Respondent first argues that petitioner has not exhausted the same four claims in the petition that the superior court found had not been administratively exhausted and that those portions of the petition must therefore be dismissed.

A petitioner who is in state custody and wishes to challenge his conviction in federal court through a petition for writ of habeas corpus must first exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is designed to afford comity to state courts by giving them the first opportunity to correct the state's allegedly unconstitutional conduct. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*, 854 F.2d 1158, 1163 (9th Cir. 1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal bases. *Duncan*, 513 U.S. at 365; *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992).

Here, petitioner asserted all the claims raised in the federal petition in his petition to the California Supreme Court. Respondent argues that, because four of the claims were procedurally barred under state law due to petitioner's failure to administratively exhaust them, petitioner cannot be considered to have presented the claims fairly. Respondent has not provided the court with any case in which a federal court has concluded that to fairly present a habeas claim to a state court the claim must not be procedurally barred by California's rule requiring pre-suit

administrative exhaustion. Absent authority, the undersigned rejects respondent's argument that petitioner did not fairly present his claims to the California Supreme Court.

Respondent's argument that the same four claims are procedurally defaulted fares better. As a general rule, "[a] federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)). The state-law ground may be substantive (i.e., going to the merits of the claim) or it may be procedural (i.e., barring consideration of the merits). *Id.* In order for a state procedural rule to be found independent, the state law basis for the decision must not be interwoven with federal law. *Cooper v. Neven*, 641 F.3d 322, 332 (9th Cir. 2011); *Bennett v. Mueller*, 322 F.3d 573, 581 (9th Cir. 2003). To be deemed adequate, the rule must be well established and consistently applied. *Walker*, 562 U.S. at 315; *James v. Schriro*, 659 F.3d 855, 878 (9th Cir. 2011). Even if the state rule is independent and adequate, a procedurally-defaulted claim may be reviewed by the federal court if the petitioner can show: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

In its denial of petitioner's habeas petition, the superior court cited to *In re Dexter*, which stands for the proposition that an inmate must exhaust administrative remedies prior to seeking judicial review. ECF No. 1 at 27-28 (relying on, inter alia, *In re Dexter*, 25 Cal.3d 921, 925 (1979)). California's rule requiring inmates to exhaust administrative remedies is independent of federal law. *See Dexter*, 25 Cal.3d at 925 (relying solely on state authority and the availability of an administrative process); Cal. Code Regs. tit. 15, § 3084.1(a) ("Any inmate . . . may appeal any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare."). Furthermore, California's exhaustion requirement is adequate as it is firmly established and regularly applied. *Albelleria v. District Court of Appeal*, 17 Cal. 2d 280, 292 (1941) ("[T]he rule is that where an administrative remedy is provided by statute, relief must be

sought from the administrative body and this remedy exhausted before the courts will act."); *In re Serna*, 76 Cal. App. 3d 1010, 1014 (1978) ("The well established doctrine of exhaustion of administrative remedies applies to grievances lodged by prisoners); *In re Muszalski*, 52 Cal. App. 3d 500, 503 (1975) ("It is well settled as a general proposition that a litigant will not be afforded relief in the courts unless and until he has exhausted available administrative remedies."). The superior court denied four of petitioner's habeas claims failure to exhaust administrative remedies. Because this is an adequate and independent state law ground for denying him relief, this court may not reach the merits of petitioner's claims absent some exception to the general rule. No such exception has been established here.

Petitioner does not provide any facts showing cause or prejudice, nor does he allege that failure to hear his claims will result in a miscarriage of justice. Rather, petitioner argues simply that this court may reach the merits of his claims because the state court erred in concluding that he failed to exhaust his administrative remedies. According to petitioner, the administrative appeal form lacked sufficient space for him to include all of his claims and thus the state court should have excused his failure to do so. Unfortunately for petitioner, the issue of administrative exhaustion was for the state court to decide. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) ("Federal habeas courts lack jurisdiction . . . to review state court applications of state procedural rules."). Absent any indication that the state court's application of the rule in this case was "clearly untenable" and a "subterfuge to avoid federal review of a deprivation" of constitutional rights (*see Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007)), this court lacks authority to review the state court's decision on exhaustion. There is no indication of such lawless conduct by the state court here.[2]

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[2] The court has reviewed petitioner's administrative appeal, and it is by no means clear that petitioner could not have included all issues within the space provided by the form, or by attaching another form, or by pursuing different issues in different appeals. Certainly, the state court's conclusion that petitioner failed to provide facts from which the court might excuse his failure to exhaust (ECF No. 12-4 at 45) was not untenable.

The superior court denied four of petitioner's habeas claims for failure to exhaust administrative remedies. Because this is an independent and adequate state procedural ground for denying the claims, this court is barred from considering their merits.

As to petitioner's remaining claim, the court agrees with respondent that the claim lies outside this court's jurisdiction. The claim is that correctional officers failed to collect and preserve evidence connected with the disciplinary action in accordance with a prison policy. Beyond a cursory reference to "due process of law," petitioner does not allege that failure to follow the policy violated the federal Constitution or any federal law. ECF No. 1 at 5; *see Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) (a habeas petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process."). The substance of petitioner's claim is entirely that the policy was not followed, and his statement of the claim contains no argument that the failure to follow the policy deprived plaintiff of a federally-protected right. ECF No. 1 at 5 and 14-17. Federal habeas corpus relief is unavailable to correct violations of state law. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). Accordingly, plaintiff's remaining claim must also be dismissed.

III. Conclusion and Recommendation

For the foregoing reasons, it is hereby RECOMMENDED that respondent's July 7, 2015 motion to dismiss (ECF No. 12) be granted and that the petition be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In his objections petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section

2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: January 11, 2016.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE