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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8

9 George Johnson,

No. CV-09-959-PHX-GMS

10 Petitioner,

ORDER

11 vs.

12 Charles Ryan,

13 Respondent.
14

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16 Pending before the Court is the Petition for Writ of Habeas Corpus, filed by Petitioner
17 George Johnson. (Dkt. # 7.) On April 15, 2010, Magistrate Judge David K. Duncan issued
18 a Report and Recommendation (“R & R”) in which he proposed that the Court deny the
19 habeas petition without prejudice because Mr. Johnson’s state-court petition for post-
20 conviction relief was still pending before the Maricopa County Superior Court. (Dkt. # 15.)
21 Mr. Johnson timely filed Written Objections to the R & R on April 26, 2010 (Dkt. # 16);
22 nonetheless, because those objections are without merit, the Court accepts the R & R as set
23 forth below.

24 **STANDARD OF REVIEW**

25 Federal district courts ““may accept, reject, or modify, in whole or in part, the findings
26 or recommendations made by the magistrate [judge].” *Carillo-Lozano v. Stolc*, 669 F.
27 Supp.2d 1074, 1076 (D. Ariz. 2009) (quoting 28 U.S.C. § 636(b)(1)); *see United States v.*
28 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While a district judge “must review the

1 magistrate judge’s findings and recommendations *de novo if objection is made,*” *Schmidt v.*
2 *Johnstone*, 263 F. Supp.2d 1219, 1226 (D. Ariz. 2003)), no such review is necessary when
3 the parties do not raise objections. *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (holding that
4 district courts are not required to conduct “any review at all . . . of any issue that is not the
5 subject of objection”); *see also* 28 U.S.C. § 636(b)(1) (“[T]he court shall make a *de novo*
6 determination of those portions of the [R & R] to which objection is made.”); *Carrillo-*
7 *Lozano*, 669 F. Supp. at 1076 (same).

8 DISCUSSION

9 State prisoners seeking to challenge their convictions or sentences through a writ of
10 habeas corpus must first exhaust state judicial remedies by giving to the highest state court
11 a fair opportunity to rule on the merits of each issue they wish to raise in federal court. 28
12 U.S.C. § 2254(b),(c). When a habeas petitioner has post-conviction proceedings pending in
13 state court, the exhaustion requirement is not satisfied. *Sherwood v. Tomkins*, 716 F.2d 632,
14 634 (9th Cir. 1983). Even if the issue that a habeas petitioner plans to raise in his federal
15 petition has been finally settled in state court, and hence seemingly exhausted, the petitioner
16 must await the outcome of any pending state-court challenges to his state conviction before
17 proceeding in federal court. *Id.* In addition, a federal petitioner may not complete the
18 exhaustion process in state court after filing a federal petition with then-unexhausted claims:
19 “The appropriate time to assess whether a prisoner has exhausted his state remedies is when
20 the federal habeas petition is filed, not when it comes on for hearing in the district court or
21 court of appeals.” *Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999) (citations omitted)
22 (quoting *Brown v. Maass*, 11 F.3d 914, 915 (9th Cir.1993) (per curiam)); *see also*
23 *Domaingue v. Butterworth*, 641 F.2d 8, 14 (1st Cir. 1981) (declining to take judicial notice
24 of state court decision allegedly establishing exhaustion because that decision was rendered
25 *after* the petitioner filed his federal habeas petition).

26 In this case, Judge Duncan recommended that the Court deny Mr. Johnson’s habeas
27 petition because his “post-conviction proceedings are still pending” in Arizona State Court.
28 (Dkt. # 15 at 2.) In his Written Objections, Mr. Johnson provides a minute entry from

1 Maricopa County Superior indicating that his state court proceedings were dismissed on
2 April 9, 2010, six days before Judge Duncan issued the R & R. (See Dkt. # 16 at 2.) Yet,
3 while it appears that Mr. Johnson's petition for collateral review is no longer pending in state
4 court, *Gatlin* instructs that his habeas petition must be dismissed because "[t]he appropriate
5 time to assess whether a prisoner has exhausted his state remedies is when the federal habeas
6 petition is filed, not when it comes on for hearing in the district court or court of appeals."
7 See 189 F.3d at 889. Mr. Johnson filed the instant Petition on October 2, 2009. (Dkt. # 6.)
8 At that time, his state post-conviction relief proceedings were still pending. (See Dkt. # 16
9 at 2.) Accordingly, the R & R correctly determined that Mr. Johnson's habeas Petition should
10 be dismissed for failure to exhaust.¹

11 **IT IS THEREFORE ORDERED:**

12 (1) Judge Duncan's R & R (Dkt. # 15) is **ACCEPTED** as set forth in this Order;

13 (2) Mr. Johnson's Petition for Writ of Habeas Corpus and request for an evidentiary
14 hearing (Dkt. # 7) are **DENIED** without prejudice;

15 (3) The Clerk of Court is directed to **TERMINATE** this action.

16 (4) A certificate of appealability is **DENIED** with respect to each of the claims
17 asserted in Mr. Johnson's Petition.

18 DATED this 5th day of May, 2010.

19 
20 _____
21 G. Murray Snow
22 United States District Judge
23
24

25 ¹Dismissal for failure to exhaust is neither a dismissal with prejudice nor a denial on
26 the merits; therefore, should Mr. Johnson return to federal court with another petition after
27 exhausting his state claims, the latter petition will not be considered a "second or successive
28 petition" subject to heightened procedural scrutiny. *Slack v. McDaniel*, 529 U.S. 473, 485-86
(2000).