



1 **PROCEEDINGS**

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3 Petitioner filed a "Petition for Writ of Habeas Corpus" in this  
4 Court<sup>1</sup> on May 21, 2013. The Petition challenges an April 10, 2013  
5 sentence imposed on Petitioner by the Pasadena Superior Court  
6 (Petition at 2-4). According to the Petition, Petitioner has not  
7 appealed the sentence and has not filed any petition, application or  
8 motion with respect to the sentence (Petition at 5-6). It thus  
9 appears from the face of the Petition that Petitioner has failed to  
10 exhaust available state remedies as to any of the claims alleged in  
11 the Petition. Accordingly, the Petition should be denied and  
12 dismissed without prejudice, pursuant to Rule 4 of the Rules Governing  
13 Section 2254 Cases in the United States District Courts.

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15 **DISCUSSION**

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17 A federal court will not grant a state prisoner's petition for  
18 writ of habeas corpus unless it appears that the prisoner has  
19 exhausted available state remedies. 28 U.S.C. § 2254(b) - (c);  
20 Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526  
21 U.S. 838, 842 (1999). "Comity thus dictates that when a prisoner  
22 alleges that his continued confinement for a state court conviction  
23 violates federal law, the state courts should have the first  
24 opportunity to review this claim and provide any necessary relief."  
25 O'Sullivan v. Boerckel, 526 U.S. at 844. State remedies have not been

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28 <sup>1</sup> The caption of the Petition suggests that Petitioner  
may have intended to file the Petition in the Pasadena Superior  
Court.

1 exhausted unless and until the petitioner's federal claims have been  
2 fairly presented to the state's highest court. See Castille v.  
3 Peoples, 489 U.S. 346, 350-51 (1989); James v. Borg, 24 F.3d 20, 24  
4 (9th Cir.), cert. denied, 513 U.S. 935 (1994).

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6 Petitioner has not yet presented any of his claims to the  
7 California Supreme Court. Petitioner may be able to present his  
8 claims to that court. See In re Harris, 5 Cal. 4th 813, 825, 21 Cal.  
9 Rptr. 2d 373, 855 P.2d 391 (1993) ("[H]abeas Corpus has become a  
10 proper remedy in this state to collaterally attack a judgment of  
11 conviction which has been obtained in violation of fundamental  
12 constitutional rights.") (citations and quotations omitted).<sup>2</sup>

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14 In certain circumstances, the Court has authority to stay a  
15 "mixed" petition containing both exhausted and unexhausted claims.  
16 See Rhines v. Weber, 544 U.S. 269 (2005) ("Rhines"); King v. Ryan, 564  
17 F.3d 1133, 1143 (9th Cir.), cert. denied, 558 U.S. 887 (2009) (stay  
18 procedure authorized by Kelly v. Small, 315 F.3d 1063 (9th Cir.),  
19 cert. denied, 548 U.S. 1042 (2003), overruled on other grounds,  
20 Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007) ("Kelly"), remains  
21 available after Rhines). However, the present Petition is not mixed;  
22 it is completely unexhausted. The Court cannot stay a completely

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24 <sup>2</sup> The Court expresses no opinion concerning whether  
25 consideration of a state habeas petition might be foreclosed by  
26 state procedural law. The California Supreme Court should  
27 evaluate this matter in the first instance. Moreover, even if  
28 there exists an applicable state procedural bar, the California  
Supreme Court nevertheless might choose to reach the merits of  
Petitioner's claims. See, e.g., Park v. California, 202 F.3d  
1146 (9th Cir.), cert. denied, 531 U.S. 918 (2000).

1 unexhausted petition. See Rasberry v. Garcia, 448 F.3d 1150, 1154  
2 (9th Cir. 2006) (Rhines stay inappropriate); Dimitris v. Virga, 2012  
3 WL 5289484, at \*4 & n.3 (C.D. Cal. Feb. 16, 2012), adopted, 2012 WL  
4 5267741 (C.D. Cal. Oct. 22, 2012) (Rhines and Kelly stays  
5 inappropriate); Jarrar v. Barnes, 2009 WL 2394361, at \*1 n.1 (E.D.  
6 Cal. Aug. 4, 2009) (Kelly stay inappropriate); Tappin v. United States  
7 District Court, 2008 WL 686555, at \*8 (E.D. Cal. Mar. 11, 2008)  
8 (same). Therefore, the Petition must be denied and dismissed without  
9 prejudice.

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11 **RECOMMENDATION**

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13 For the foregoing reasons, IT IS RECOMMENDED that the Court issue  
14 an Order: (1) accepting and adopting this Report and Recommendation;  
15 (2) directing that Judgment be entered denying and dismissing the  
16 Petition without prejudice.

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18 DATED: May 23, 2013.

19  
20 \_\_\_\_\_/s/  
21 CHARLES F. EICK  
22 UNITED STATES MAGISTRATE JUDGE  
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1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of  
3 Appeals, but may be subject to the right of any party to file  
4 objections as provided in the Local Rules Governing the Duties of  
5 Magistrate Judges and review by the District Judge whose initials  
6 appear in the docket number. No notice of appeal pursuant to the  
7 Federal Rules of Appellate Procedure should be filed until entry of  
8 the judgment of the District Court.

9 If the District Judge enters judgment adverse to Petitioner, the  
10 District Judge will, at the same time, issue or deny a certificate of  
11 appealability. Within twenty (20) days of the filing of this Report  
12 and Recommendation, the parties may file written arguments regarding  
13 whether a certificate of appealability should issue.

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