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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

HAROLD VINCENT FRANKLIN,  
Petitioner,  
v.  
LEE BACA, et al.,  
Respondents.

No. CV 13-8265-R (PLA)

**ORDER DISMISSING PETITION FOR  
FAILURE TO EXHAUST, PROSECUTE  
AND FOLLOW COURT ORDERS**

**I.**

**BACKGROUND**

Petitioner initiated this action on November 7, 2013, by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition") in this Court. The Petition challenges petitioner's 2008 conviction in the Los Angeles County Superior Court and his sentence therein. (Petition at 2). In a separate state habeas corpus petition filed with the California Supreme Court on September 30, 2013, petitioner sets forth essentially the same grounds for relief as he does in the instant federal Petition. (See Petition, Exhibit F at 3-4 (Case No. S213739)). The state petition was pending at the time petitioner filed the instant Petition in this Court, and remains so. (See Petition at 5, Exhibit F; <http://appellatecases.courtinfo.ca.gov> (last visited Dec. 19, 2013)).

1 Because the Petition appeared to be completely unexhausted, the Magistrate Judge on  
2 November 13, 2013, ordered petitioner to show cause, no later than December 4, 2013, why the  
3 Petition should not be dismissed for failure to exhaust state remedies.<sup>1</sup> Petitioner was instructed  
4 that the filing of an Amended Petition showing he had exhausted his state judicial remedies would  
5 be deemed compliance with that portion of the Order to Show Cause. Petitioner was further  
6 advised that his failure to timely respond to the Order would result in the action being dismissed  
7 for lack of exhaustion and for failure to prosecute and follow Court orders.

8 **To date, petitioner has not filed a response to the November 13, 2013, Order, and his**  
9 **time to do so has passed.**

10  
11 **II.**

12 **DISCUSSION**

13 As a matter of comity, a federal court will not entertain a habeas corpus petition unless the  
14 petitioner has exhausted the available state judicial remedies on every ground presented in the  
15 petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The  
16 habeas statute explicitly provides that a habeas petition brought by a person in state custody “shall  
17 not be granted unless it appears that -- (A) the applicant has exhausted the remedies available  
18 in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii)  
19 circumstances exist that render such process ineffective to protect the rights of the applicant.” 28  
20 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived  
21 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

22 Exhaustion requires that petitioner’s contentions be fairly presented to the state supreme  
23 court even if that court’s review is discretionary. O’Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119  
24 S.Ct. 1728, 144 L.Ed.2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077, n.3 (9th Cir. 2000).  
25 Petitioner must give the state courts “one full opportunity to resolve any constitutional issues by  
26 invoking one complete round of the State’s established appellate review process” in order to

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28 <sup>1</sup> The Order to Show Cause also discussed the apparent successive nature of the instant  
Petition. That issue is not addressed herein.

1 exhaust his claims. O'Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the  
2 prisoner has described in the state court proceedings both the operative facts and the federal legal  
3 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887,  
4 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438  
5 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. California Dep't of  
6 Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,  
7 218 F.3d 1017 (9th Cir. 2000). State remedies are not exhausted if an appeal or petition for post-  
8 conviction relief is still pending in state court. Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir.  
9 1983) (if petitioner has a pending state appeal, he "must await the outcome of his appeal before  
10 his state remedies are exhausted"); Schnepp v. Oregon, 333 F.2d 288, 288 (9th Cir. 1964) (per  
11 curiam) (state remedies are unexhausted where a petition for post-conviction relief is still pending  
12 in state court). Petitioner has the burden of demonstrating that he has exhausted available state  
13 remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

14 Here, petitioner has not exhausted his state judicial remedies in connection with this matter.  
15 (See Petition at 5, Exhibit F). The grounds for relief raised in the Petition were not presented to  
16 the California Supreme Court on direct review (Petition at 4-5), although they have been raised  
17 in a habeas petition to that court. (Petition at 5). That petition, however, is still pending. (See  
18 California Appellate Courts Case Information website at <http://appellatecases.courtinfo.ca.gov> (last  
19 visited Dec. 19, 2013)). Because petitioner's state habeas corpus petition remains pending in the  
20 California Supreme Court, the instant Petition is unexhausted. See Sherwood, 716 F.2d at 634.  
21 Because the Petition is unexhausted, it is subject to being dismissed without prejudice.  
22 Greenawalt v. Stewart, 105 F.3d 1268, 1271, 1273-75 (9th Cir. 1997).

23 Moreover, it is well established that a district court has authority to dismiss a petitioner's  
24 action because of his or her failure to prosecute or to comply with court orders. See Fed. R. Civ.  
25 P. 41(b); Link v. Wabash Railroad Co., 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L.Ed.2d 734  
26 (1962) (holding that a court's authority to dismiss for lack of prosecution is necessary to prevent  
27 undue delays in the disposition of pending cases and to avoid congestion in the calendars of the  
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1 district courts); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (holding that a district court  
2 may dismiss an action for failure to comply with any order of the court).

3 In determining whether to dismiss this action due to petitioner's failure to prosecute or  
4 comply with Court orders, the Court must consider the following five factors: "(1) the public's  
5 interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk  
6 of prejudice to the respondents; (4) the public policy favoring disposition of cases on their merits[;]  
7 and (5) the availability of less drastic sanctions." Carey v. King, 856 F.2d 1439, 1440 (9th Cir.  
8 1988); see also In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to prosecute); Ferdik, 963  
9 F.2d at 1260-61 (failure to comply with court orders).

10 The first two factors -- the public's interest in expeditious resolution of litigation and the  
11 Court's need to manage its docket -- weigh in favor of dismissal. Petitioner's failure to file any  
12 response to the Magistrate Judge's November 13, 2013, Order to Show Cause hinders the Court's  
13 ability to move this case toward disposition and indicates that petitioner does not intend to litigate  
14 this action diligently.

15 The third factor -- prejudice to respondent -- also weighs in favor of dismissal. A rebuttable  
16 presumption of prejudice to respondents arises when a petitioner unreasonably delays prosecution  
17 of an action. Eisen, 31 F.3d at 1452-53. Nothing suggests that such a presumption is  
18 unwarranted in this case.

19 The fourth factor -- public policy in favor of deciding cases on their merits -- weighs against  
20 dismissal. However, it is petitioner's responsibility to move his case toward a disposition at a  
21 reasonable pace and to avoid dilatory and evasive tactics. See Morris v. Morgan Stanley Co., 942  
22 F.2d 648, 652 (9th Cir. 1991). Petitioner has not discharged this responsibility. In these  
23 circumstances, the public policy favoring resolution of disputes on the merits does not outweigh  
24 petitioner's failure to comply with Court orders.

25 The fifth factor -- availability of less drastic sanctions -- weighs in favor of dismissal. The  
26 Magistrate Judge attempted to avoid dismissal by advising petitioner that the failure to timely  
27 respond to the Order to Show Cause would result "in the action being dismissed for lack of  
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1 exhaustion . . . and for failure to prosecute and follow Court orders.” Nonetheless, petitioner has  
2 failed to respond to the November 13, 2013, Order.

3 Taking all of the above factors into account, dismissal for failure to prosecute and follow Court  
4 orders is appropriate. Such a dismissal, however, should not be entered unless petitioner has been  
5 notified that dismissal is imminent. See West Coast Theater Corp. v. City of Portland, 897 F.2d  
6 1519, 1523 (9th Cir. 1990). In this case, petitioner was cautioned about the possibility of dismissal  
7 in the November 13, 2013, Order.

8 In light of the foregoing, the Court finds that it is appropriate to dismiss the Petition for lack of  
9 exhaustion, and for failure to prosecute and comply with Court orders. IT IS THEREFORE  
10 ORDERED that this action is **dismissed without prejudice**.

11  
12 DATED: December 23, 2013



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HONORABLE MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE