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

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| AARON VASQUEZ, |) | NO. CV 15-528-JAK(E) |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | REPORT AND RECOMMENDATION OF |
| |) | |
| ELVIN VALENZUELA, |) | UNITED STATES MAGISTRATE JUDGE |
| |) | |
| Respondent. |) | |
| _____ |) | |

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on January 23, 2015. The Petition seeks to challenge a prison disciplinary finding that resulted in a ninety day loss of credit (Petition at 2). According to the Petition, the only

1 document submitted to the California Supreme Court in connection with
2 the prison disciplinary finding was a habeas petition mailed on
3 January 11, 2015 (Petition at 3-4). The California Supreme Court has
4 not yet ruled on the recently mailed state petition (Petition at 5).
5 It thus appears from the face of the present federal Petition that
6 Petitioner has failed to exhaust available state remedies as to any of
7 the claims alleged in the Petition. Accordingly, the Petition should
8 be denied and dismissed without prejudice, pursuant to Rule 4 of the
9 Rules Governing Section 2254 Cases in the United States District
10 Courts.

11 12 **DISCUSSION**

13
14 A federal court will not grant a state petitioner's petition for
15 writ of habeas corpus unless it appears that the petitioner has
16 exhausted available state remedies. 28 U.S.C. § 2254(b) - (c);
17 Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526
18 U.S. 838, 842 (1999). "Comity thus dictates that when a prisoner
19 alleges that his continued confinement for a state court conviction
20 violates federal law, the state courts should have the first
21 opportunity to review this claim and provide any necessary relief."
22 O'Sullivan v. Boerckel, 526 U.S. at 844. Petitioner bears the burden
23 to show compliance with the exhaustion requirement. See, e.g.,
24 Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981), cert. denied,
25 455 U.S. 1023 (1982); see also Coningford v. Rhode Island, 640 F.3d
26 478, 482 (1st Cir.), cert. denied, 132 S. Ct. 426 (2011); Morgan v.
27 Superior Court of Los Angeles, 2012 WL 6140213, at *2 (C.D. Cal. Oct.
28 31, 2012), adopted, 2012 WL 6178430 (C.D. Cal. Dec. 11, 2012).

1 "State remedies have not been exhausted unless . . . the highest
2 state court has disposed of the claim on the merits. . . ." Carothers
3 v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979) (citation omitted).
4 According to the present Petition, the California Supreme Court has
5 not yet adjudicated the merits of any of Petitioner's claims.
6 Accordingly, all of Petitioner's claims remain unexhausted.

7
8 In certain circumstances, the Court has authority to stay a
9 "mixed" petition, that is, a petition containing both exhausted and
10 unexhausted claims. See Rhines v. Weber, 544 U.S. 269 (2005)
11 ("Rhines"); King v. Ryan, 564 F.3d 1133, 1143 (9th Cir.), cert.
12 denied, 558 U.S. 887 (2009) (stay procedure authorized by Kelly v.
13 Small, 315 F.3d 1063 (9th Cir.), cert. denied, 548 U.S. 1042 (2003),
14 overruled on other grounds, Robbins v. Carey, 481 F.3d 1143 (9th Cir.
15 2007) ("Kelly"), remains available after Rhines). However, the
16 present Petition is not mixed; it is completely unexhausted. The
17 Court cannot stay a completely unexhausted petition. See Rasberry v.
18 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (Rhines stay
19 inappropriate); Dimitris v. Virga, 2012 WL 5289484, at *4 & n.3 (C.D.
20 Cal. Feb. 16, 2012), adopted, 2012 WL 5267741 (C.D. Cal. Oct. 22,
21 2012) (Rhines and Kelly stays inappropriate); Jarrar v. Barnes, 2009
22 WL 2394361, at *1 n.1 (E.D. Cal. Aug. 4, 2009) (Kelly stay
23 inappropriate); Tappin v. United States District Court, 2008 WL
24 686555, at *8 (E.D. Cal. Mar. 11, 2008) (same). Therefore, the
25 Petition must be dismissed without prejudice.

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1 **RECOMMENDATION**

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3 For the foregoing reasons, IT IS RECOMMENDED that the Court issue

4 an Order: (1) accepting and adopting this Report and Recommendation;

5 and (2) directing that Judgment be entered denying and dismissing the

6 Petition without prejudice.

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8 DATED: January 26, 2015.

9

10 _____/s/_____

11 CHARLES F. EICK

12 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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