

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 THOMAS R. CUNNINGHAM,

12 Petitioner,

13 v.

14 E. VALENZUELA,

15 Respondent.  
16

No. CV 16-3629-DMG (AGR)

ORDER TO SHOW CAUSE

17 On March 28, 2016, Petitioner filed a Petition for Writ of Habeas Corpus by a  
18 Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition”) in the Northern  
19 District of California, which transferred the action to this district. For the reasons  
20 discussed below, the Court orders Petitioner to show cause, on or before **June 27,**  
21 **2016**, why this Court should not recommend dismissal without prejudice for failure to  
22 exhaust state remedies.

23 I.

24 **EXHAUSTION**

25 The Petition was filed after enactment of the Antiterrorism and Effective Death  
26 Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA in reviewing  
27 the petition. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).  
28

1           The AEDPA expressly provides that a petition for writ of habeas corpus brought  
2 by a person in state custody “shall not be granted unless it appears that – (A) the  
3 applicant has exhausted the remedies available in the courts of the State; or (b)(I) there  
4 is an absence of available State corrective process; or (ii) circumstances exist that  
5 render such process ineffective to protect the rights of the applicant.” 28 U.S.C.  
6 § 2254(b)(1).

7           Exhaustion requires that Petitioner’s contentions be fairly presented to the state’s  
8 highest court, in this case the California Supreme Court. *James v. Borg*, 24 F.3d 20, 24  
9 (9th Cir. 1994). Petitioner bears the burden of demonstrating that she described to the  
10 California Supreme Court both the operative facts and the federal legal theory on which  
11 his claim is based. *Duncan v. Henry*, 513 U.S. 364 (1995).

12           The Petition contains one ground for relief. Petitioner asserts that the trial court  
13 wrongly denied, for lack of jurisdiction, his Cal. Penal Code § 4019 petition seeking 177  
14 days of additional sentencing credit. But Petitioner admits that he has not presented  
15 this claim to California Supreme Court. (Petition ¶ 9.) The Court takes judicial notice the  
16 state courts’ public records include no action filed by a Thomas Cunningham in the California  
17 Supreme Court. Petitioner must exhaust his claim in the California Supreme Court before  
18 presenting it in federal court.

19           For these reasons, it appears that the Petition in this Court is completely  
20 unexhausted. The Ninth Circuit recently held that a district court has authority to stay  
21 habeas petitions that are wholly unexhausted. *Mena v. Long*, 813 F.3d 907, 912 & n.3  
22 (9th Cir. 2016). In light of *Mena*, Petitioner may wish to file a motion for a stay of his  
23 federal habeas petition while he exhausts his claim before the California Supreme  
24 Court. To obtain a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), a petitioner must  
25 show that he had good cause for failing to exhaust claims in the California Supreme  
26 Court, that his claims are "potentially meritorious" and that he has not engaged in  
27 intentional delay tactics. *Id.* at 277-78. Alternatively, Petitioner may seek a stay under  
28

1 *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003). Petitioner should promptly initiate  
2 exhaustion proceedings in the state court without waiting for a ruling from this court on  
3 his motion for a stay.

4 II.

5 **ORDER TO SHOW CAUSE**

6 IT IS THEREFORE ORDERED that, on or before **June 27, 2016**, Petitioner shall  
7 show cause, if there be any, why this Court should not recommend dismissal without  
8 prejudice for failure to exhaust state remedies. If Petitioner contends that the  
9 exhaustion requirement has been met, Petitioner should attach a complete copy of his  
10 petition before the California Supreme Court, a complete copy of any decision by the  
11 California Supreme Court, and clearly explain how the exhaustion requirement has  
12 been met. If Petitioner wishes to seek a stay while he exhausts remedies in state court,  
13 Petitioner must file a motion for stay of proceedings on or before **June 27, 2016**.

14 ***If Petitioner does not respond to this Order to Show Cause, the Magistrate***  
15 ***Judge will recommend that the Court order the petition dismissed, without***  
16 ***prejudice, for failure to exhaust Petitioner's claims.***

17  
18  
19 DATED: May 27, 2016



ALICIA G. ROSENBERG  
United States Magistrate Judge