

1 the grounds for relief raised therein. (See FAP at 5-6.) Petitioner was advised of the
2 requirement to exhaust state remedies prior to bringing a habeas petition in federal court
3 and ordered to demonstrate that his claims were exhausted or dismiss his case.

4 On June 9, 2017, after Petitioner failed to respond to the OSC in a timely manner, the
5 Court sua sponte granted Petitioner an extension of time. The Court reminded Petitioner of
6 the requirement to exhaust state remedies. The Court also explained that Petitioner should
7 select one of the following options: (1) show that he has exhausted state remedies; (2) file a
8 motion for stay and abeyance of this action while he exhausted state remedies; or (3)
9 voluntarily dismiss the case.

10 On June 21, 2017, Petitioner filed a response to the OSC. Rather than selecting one
11 of the options provided by the Court, Petitioner stated:

12 There is no state remedies at the present time due to the personal problems coming
13 from the United States dealing with the defendant Timothy Lenard. I am requesting
14 that Federal Court continues to deal with all my issues. Even after I am released
15 from custody to help me deal with the sheriff departments attitudes towards me over
16 [unintelligible] not being owned by the United States Government.

17 Petitioner's response is clearly insufficient. He has failed to show that he has exhausted
18 state remedies by fairly presenting his claims to the California Supreme Court, either on
19 direct appeal or on habeas review. He also has failed to file a motion for stay and abeyance
20 or voluntarily dismiss his case.

21 DISCUSSION

22 As a matter of comity, a federal court will not entertain a habeas corpus petition
23 unless the petitioner has exhausted the available state judicial remedies on every ground for
24 relief presented in the petition. Rose v. Lundy, 455 U.S. 509, 518-22 (1982). Pursuant to
25 28 U.S.C. § 2254(b)(1), a habeas petition brought by a person in state custody “shall not be
26 granted unless it appears that – (A) the applicant has exhausted the remedies available in
27 the courts of the State; or (B)(i) there is an absence of available State corrective process; or
28

1 (ii) circumstances exist that render such process ineffective to protect the rights of the
2 applicant.” Under the total exhaustion rule, if even one of the claims being alleged by a
3 habeas petitioner is unexhausted, the petition must be dismissed. See Rose, 455 U.S. at
4 522; see also Coleman v. Thompson, 501 U.S. 722, 731 (1991), modified by Martinez v.
5 Ryan, 566 U.S. 1 (2012); Castille v. Peoples, 489 U.S. 346, 349 (1989). The Ninth Circuit
6 has held that a federal court may raise the failure to exhaust issue sua sponte. See Stone
7 v. City & Cnty. of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992) (as amended).

8 Exhaustion requires that the petitioner's claims be fairly presented to the state courts
9 and be disposed of on the merits by the highest court of the state. James v. Borg, 24 F.3d
10 20, 24 (9th Cir. 1994); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979); see also
11 Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009). A claim has not been fairly
12 presented to a state court unless the petitioner has described both the operative facts and
13 the federal legal theory on which the claim is based. Duncan v. Henry, 513 U.S. 364,
14 365-66 (1995) (per curiam); Picard v. Connor, 404 U.S. 270, 275-78 (1971); Greenway v.
15 Schriro, 653 F.3d 790, 801 (9th Cir. 2011); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir.
16 1996). Petitioner has the burden of demonstrating that he has exhausted his available state
17 remedies. See, e.g., Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam).
18 However, the Ninth Circuit has held that, for purposes of exhaustion, pro se petitions are
19 held to a more lenient standard than counseled petitions. Sanders v. Ryder, 342 F.3d 991,
20 999 (9th Cir. 2003); Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc).

21 Here, it appears from the face of the FAP that Petitioner did not exhaust his state
22 remedies with respect to any of his grounds for relief. Petitioner did not list any California
23 Supreme Court filings on the habeas petition form. Indeed, in response to the question on
24 the form asking whether he sought review in the California Supreme Court, Petitioner
25 checked the “No” box. (FAP at 5.) Petitioner did not check any boxes or provide any
26 information in response to the questions on the form asking whether he has filed any other
27 petitions, applications, or motions with respect to his conviction, commitment, or any other
28 issue. (FAP at 6.) In addition, based on the Court's review of the California Appellate

1 Courts website, it appears that Petitioner has not filed a petition for review or habeas
2 petition with the California Court of Appeal or California Supreme Court.¹

3 As such, Petitioner has not exhausted any of the grounds for relief in his FAP.
4 If it were clear that the California Supreme Court would hold that Petitioner's claims were
5 procedurally barred under state law, then the exhaustion requirement would be satisfied.
6 See Castille, 489 U.S. at 351-52; Johnson, 88 F.3d at 831. Here, however, it is not clear
7 that the California Supreme Court will hold that Petitioner's claims are procedurally barred
8 under state law. See, e.g., In re Harris, 5 Cal.4th 813, 824 (1993) (granting habeas relief
9 where petitioner claimed sentencing error, even though the alleged sentencing error was
10 raised and rejected on direct appeal); People v. Sorensen, 111 Cal. App. 2d 404, 405
11 (1952) (noting that claims that fundamental constitutional rights have been violated may be
12 raised by state habeas petition). The Court therefore concludes that this is not an
13 appropriate case for invocation of either "exception" cited above to the requirement that a
14 petitioner's federal claims must first be fairly presented to, and disposed of on the merits by,
15 the state's highest court.

16 Additionally, although the Court provided Petitioner an opportunity to file a request for
17 a stay under Rhines v. Weber, 544 U.S. 269 (2005), and/or Kelly v. Small, 315 F.3d 1063
18 (9th Cir. 2003) (as amended), overruled on other grounds by Robbins v. Carey, 481 F.3d
19 1143 (9th Cir. 2007), he has not done so.

20 Accordingly, because the claims in the Petition are unexhausted, dismissal without
21 prejudice is appropriate. See Rose, 455 U.S. at 522; Castille, 489 U.S. at 349.

22 CERTIFICATE OF APPEALABILITY

23 Pursuant to Rule 11 of the Rules Governing Section 2254 cases, the Court "must
24 issue or deny a certificate of appealability when it enters a final order adverse to the
25 applicant."
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27

28 ¹ See appellatecases.courtinfo.ca.gov.

