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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIAM ROBERT STANKEWITZ,)	1:06-cv-01220-LJO-JLT HC
)	
Petitioner,	)	ORDER VACATING STAY DATED JULY
	)	24, 2008 (Doc. 19)
)	
v.	)	ORDER DIRECTING CLERK OF THE
	)	COURT TO ADMINISTRATIVELY RE-
	)	OPEN CASE
DERRAL G. ADAMS, Warden, et al.,)	
	)	FINDINGS AND RECOMMENDATIONS TO
Respondents.	)	GRANT RESPONDENT'S MOTION TO
	)	DISMISS THE PETITION FOR LACK OF
	)	EXHAUSTION (Doc. 13)
)	
	)	ORDER DIRECTING THAT OBJECTIONS
	)	BE FILED WITHIN TWENTY DAYS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition on September 7, 2006, raising six grounds for relief. (Doc. 1). On December 18, 2008, the Court ordered Respondent to file a response. (Doc. 8). On January 28, 2008, Petitioner filed a motion to stay proceedings in order to exhaust remedies in state court. (Doc. 12). Before the Court could rule on Petitioner's motion for stay, Respondent filed a motion to dismiss the petition, contending that one of the six claims was unexhausted. (Doc. 13). On July 24, 2008, the Court granted Petitioner a stay of proceedings to permit Petitioner to exhaust his claim in state court. (Doc. 19).

In that order, the Court required Petitioner to file regular status reports regarding his

1 exhaustion efforts. Following the filing of status reports on May 19, 2008, August 15, 2008, and
2 October 3, 2008, Petitioner filed a status report on November 13, 2008 indicating that the California
3 Court of Appeal, Fifth Appellate District (“5th DCA”), had denied his state habeas petition on
4 October 6, 2008. (Doc. 24). In that status report, Petitioner also requested an extension of time of
5 sixty days in which to prepare his “opposition to the appellate denial” of his state petition. (Id.). On
6 November 25, 2008, the Court issued an informational order explaining to Petitioner that he must
7 exhaust his claim in the California Supreme Court and that he must continue to file regular status
8 reports or the stay would be lifted. (Doc. 25).

9 On January 14, 2010, after fourteen months of silence on the part of Petitioner, during which
10 he failed to file any status reports or other updates with this Court, the Court issued an Order to
11 Show Cause why the stay should not be lifted. (Doc. 26). This Order to Show Cause prompted a
12 flurry of filings by Petitioner. First, on February 5, 2010, Petitioner filed a response in which he
13 indicated that he still needs to exhaust his claim before the California Supreme Court but had been
14 delayed in that process because he had been transferred to another prison and had not had full access
15 to his legal documents. (Doc. 27). On February 9, 2010, Petitioner filed another response that
16 reiterated his contention that his prison mail had been interfered with, that he had lost the services of
17 a “jailhouse lawyer,” and that, due to the prison’s “draconian” policy limiting access to the prison
18 law library, Petitioner “felt he could not proceed.” (Doc. 29). Finally, on March 25, 2010, in a filing
19 contesting the Court’s denial of appointed counsel, Petitioner further iterated he was “presently
20 exhausting his state remedies in the California Supreme Court as of March 21, 2010,” and that he
21 would file his next status report on or about April 21, 2010. (Doc. 32). To date, Petitioner has not
22 filed any further status reports.

23 DISCUSSION

24 A. Stay of Proceedings.

25 In attempting to corroborate Petitioner’s allegation that he is “presently exhausting his state
26 remedies in the California Supreme Court,” the Court has accessed the California court system’s
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1 electronic database.¹ A search of the California Supreme Court’s database shows no evidence of any
2 filing by Petitioner other than his original petition for review in his direct appeal, a filing that was
3 denied on September 7, 2005. Moreover, other than his allegations, Petitioner has provided no
4 evidence, documentary or otherwise, in these proceedings that he has filed any document with the
5 California Supreme Court seeking to exhaust his state court remedies. Additionally, the Court notes
6 that in his response to the Order to Show Cause dated February 9, 2010, Petitioner represented to the
7 Court that he had not sought exhaustion in the California Supreme Court because of loss of access to
8 his own legal documents, lack of access to the prison law library, and the unavailability of a
9 jailhouse lawyer. (Doc. 29). Accordingly, the Court finds that Petitioner has not yet commenced
10 any habeas corpus proceeding in the California Supreme Court to exhaust his state remedies.

11 Under such circumstances, and given Petitioner’s misrepresentations to the Court regarding
12 his efforts, or lack thereof, to exhaust his claims in state court, the Court further finds that Petitioner
13 no longer meets the United States Supreme Court requirements for a stay of habeas proceedings, as
14 outlined in Rhines v. Weber, 544 U.S. 269 (2005). In that case, the Court indicated that a stay was
15 appropriate only when (1) good cause exists for a petitioner’s failure to exhaust; (2) a petitioner’s
16 unexhausted claims are not “plainly meritless” and (3) there is no indication that the petitioner
17 engaged in “abusive litigation tactics or intentional delay.” Id. at 277-278; Robbins v. Carey, 481
18 F.3d 1143, 1149 (9th Cir. 2005). Also, the Supreme Court noted that the procedure of granting a stay
19 of proceedings should be “available only in limited circumstances.” 544 U.S. at 277.

20 Here, the Court finds that Petitioner has failed to meet the first and third requirements set
21 forth above. First, he has failed to establish good cause for allowing the case to languish in a state of
22 complete inactivity since October 6, 2008, the date the California Court of Appeal, Fifth Appellate
23 District (“5th DCA”) denied his last state habeas petition, until the Court issued its Order to Show

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25 ¹The Court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
26 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.
27 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice
28 may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise
Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), aff’d, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins. Co. v.
Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). As
such, the internet website for the California Courts, containing the court system’s records for filings in the Court of Appeal
and the California Supreme Court are subject to judicial notice.

1 Cause on January 14, 2010. In the intervening fourteen months, Petitioner did absolutely nothing to
2 exhaust his state remedies in the California Supreme Court. Nevertheless, in recent filings with this
3 Court, Petitioner has implied that he has filed a habeas petition with the California Supreme Court,
4 by claiming that he “is presently exhausting his state remedies in the California Supreme Court as of
5 March 21, 2010.” (Doc. 32, p. 2). The Court finds no evidence to support such a claim. Thus,
6 under the circumstances, the Court further finds that Petitioner has “intentionally delayed” these
7 proceedings within the meaning of Rhines, and, further, that Petitioner has acted in bad faith.
8 Accordingly, since Petitioner no longer satisfies the Rhines criteria, the stay will be lifted, the case
9 will be administratively re-opened, and the Court will proceed on the petition and, consequently, the
10 Court will address Respondent’s motion to dismiss.

11 B. Motion to Dismiss.

12 Prior to the granting of the stay on July 24, 2008, Respondent filed a motion to dismiss the
13 petition for lack of exhaustion. (Doc. 13). The Court has yet to rule on that motion, but will do so
14 now, since it has ordered that the case be administratively re-opened.

15 1. Procedural Grounds for Motion to Dismiss

16 As mentioned, Respondent filed a motion to dismiss the petition because it contains an
17 unexhausted claim. Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
18 dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it
19 that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
20 Section 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990).

21 The Ninth Circuit has allowed Respondent’s to file a motion to dismiss in lieu of an answer if
22 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
23 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule
24 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
25 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for
26 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).
27 Thus, a Respondent can file a motion to dismiss after the Court orders a response, and the Court
28 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

1 In this case, Respondent's motion to dismiss is based on lack of exhaustion. Because
2 Respondent's motion to dismiss is identical in procedural standing to a motion to dismiss for failure
3 to exhaust state remedies or for state procedural default, both of which are permitted under Rule 4,
4 and because Respondent has not yet filed a formal answer, the Court will review Respondent's
5 motion to dismiss pursuant to its authority under Rule 4.

6 2. Motion to Dismiss For Lack of Exhaustion.

7 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
8 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
9 exhaustion doctrine is based on comity to the state court and gives the state court the initial
10 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
11 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
12 1163 (9th Cir. 1988).

13 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
14 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
15 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
16 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
17 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
18 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
19 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

20 Additionally, the petitioner must have specifically told the state court that he was raising a
21 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
22 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.
23 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
24 Supreme Court reiterated the rule as follows:

25 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
26 remedies requires that petitioners “fairly presen[t]” federal claims to the state courts in order
27 to give the State the “opportunity to pass upon and correct alleged violations of the prisoners'
28 federal rights” (some internal quotation marks omitted). If state courts are to be given the
opportunity to correct alleged violations of prisoners' federal rights, they must surely be
alerted to the fact that the prisoners are asserting claims under the United States Constitution.
If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied
him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not

1 only in federal court, but in state court.

2 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

3 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal
4 claims in state court *unless he specifically indicated to that court that those claims were*
5 *based on federal law.* See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since
6 the Supreme Court's decision in Duncan, this court has held that the *petitioner must make the*
7 *federal basis of the claim explicit either by citing federal law or the decisions of federal*
8 *courts, even if the federal basis is “self-evident,”* Gatlin v. Madding, 189 F.3d 882, 889 (9th
9 Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim
10 would be decided under state law on the same considerations that would control resolution of
11 the claim on federal grounds. Hiiivala v. Wood, 195 F3d 1098, 1106-07 (9th Cir. 1999);
12 Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

13 In Johnson, we explained that the petitioner must alert the state court to the fact that
14 the relevant claim is a federal one without regard to how similar the state and federal
15 standards for reviewing the claim may be or how obvious the violation of federal law is.

16 Lyons, 232 F.3d at 668-669 (italics added).

17 Respondent’s motion to dismiss contends that the first five grounds in the petition were fully
18 exhausted by the petition for review filed by Petitioner in the California Supreme Court during the
19 course of his direct appeal. (Doc. 13, pp. 5-7). However, Respondent contends that ground six of
20 the instant petition, i.e., the claim of prosecutorial misconduct, was not included in the petition for
21 review filed in the California Supreme Court and therefore has not been exhausted. The Court
22 agrees.

23 As discussed previously, the Court has found that Petitioner has filed only one proceeding in
24 the California Supreme Court, i.e., his petition for review in his direct appeal. As part of the motion
25 to dismiss, Respondent has lodged with the Court the petition for review filed by Petitioner in his
26 direct appeal. (Lodged Documents (“LD”) 7). Ground six in the instant petition states as follows:

27 The Government participated in prosecutorial misconduct and selective prosecution, and such
28 acts so affected the regularity of the trial and conviction as to violate the fundamental aspects
29 of fairness which resulted in a miscarriage of justice of constitutional proportions.

30 (Doc. 1, p. 8).

31 A full review of the petition for review filed by Petitioner in the California Supreme Court
32 establishes that it does not contain the claim set forth in ground six of the instant petition.

33 Accordingly, the Court finds that Petitioner has not exhausted ground six.

34 Thus, the petition is a mixed petition, containing both exhausted and unexhausted claims.

1 Under such circumstances, the Court will recommend granting Respondent’s motion to dismiss the
2 mixed petition. Rhines v. Weber, 544 U.S. 269, 273, 125 S.Ct. 1528 (2005). However, the Court
3 will also recommend that, before entering a judgment of dismissal, the Court grant leave for
4 Petitioner to file an amended petition deleting ground six as an alternative to dismissal. See Rose v.
5 Lundy, 455 U.S. 509, 521-522 (1982); Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005)(citing
6 Rhines).

7 **ORDER**

8
9 Accordingly, the Court HEREBY ORDERS as follows:

- 10 1. The order, dated July 24, 2008, granting a stay of proceedings (Doc. 19), is VACATED;
11 and,
12 2. The Clerk of the Court is DIRECTED to ADMINISTRATIVELY RE-OPEN the case.

13
14 **RECOMMENDATIONS**

15
16 Moreover, the Court HEREBY RECOMMENDS as follows:

- 17 1. That Respondent’s Motion to Dismiss the petition for writ of habeas corpus (Doc. 13), be
18 GRANTED because the petition contains an unexhausted claim; and,
19 2. That the petition for writ of habeas corpus (Doc. 1), be DISMISSED, *with leave* for
20 Petitioner to file an amended petition deleting the unexhausted claim and proceeding only on
21 the exhausted claims.

22 This Findings and Recommendations is submitted to the United States District Judge
23 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
24 Local Rules of Practice for the United States District Court, Eastern District of California. Within
25 twenty (20) days after being served with a copy, any party may file written objections with the court
26 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate
27 Judge’s Findings and Recommendations.” The Court will then review the Magistrate Judge’s ruling
28 pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within

1 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: May 6, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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