

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JOHN KEVIN DUMLAO, 1:08-cv-01142-LJO-SMS (HC)

Petitioner, **FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT'S MOTION TO
DISMISS**

HEDGPETH, Warden, [Dec. 25]

Respondent.

[Doc. 25]

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

RELEVANT HISTORY

On July 6, 2005, Petitioner appeared before the Board for a parole consideration hearing. The Board found that Petitioner was unsuitable for parole.

On November 4, 2005, Petitioner filed a petition for writ of habeas corpus in the Imperial County Superior Court challenging the Board's decision. (Exhibit A, to Motion.) On December 27, 2006, the petition was transferred to the Alameda County Superior Court for further proceedings. (Exhibit B, to Motion.) On February 13, 2007, the petition was denied. (Exhibit C, to Motion.)

On April 16, 2007, Petitioner filed an original petition for writ of habeas corpus in the California Court of Appeal, Fifth Appellate District. (Exhibit D, to Motion.) The petition was summarily denied. (Exhibit E, to Motion.)

On August 9, 2007, Petitioner filed an original petition for writ of habeas corpus in the California Supreme Court. (Exhibit F, to Motion.) The California Supreme Court denied the petition with citations to *In re Swain*, 34 Cal.2d 300, 304 (1949), and *People v. Duvall*, 9 Cal.4th

1 464, 474 (1995). (Exhibit G, to Motion.)

2 Petitioner filed the instant petition for writ of habeas corpus in this Court on June 17,
3 2008. Respondent filed the instant motion to dismiss on November 26, 2008, and Petitioner filed
4 an opposition on December 11, 2008. (Court Docs. 25, 27.)

5 DISCUSSION

6 A. Procedural Grounds for Motion to Dismiss

7 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
8 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
9 petitioner is not entitled to relief in the district court” The Advisory Committee Notes to
10 Rule 5 of the Rules Governing Section 2254 Cases state that “an alleged failure to exhaust state
11 remedies may be raised by the attorney general, thus avoiding the necessity of a formal answer as
12 to that ground.” The Ninth Circuit has referred to a respondent’s motion to dismiss on the
13 ground that the petitioner failed to exhaust state remedies as a request for the Court to dismiss
14 under Rule 4 of the Rules Governing Section 2254 Cases. See e.g. O’Bremski v. Maass, 915
15 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989); Hillery v. Pulley,
16 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254
17 Cases and case law, the Court will review Respondent’s motion for dismissal pursuant to its
18 authority under Rule 4.

19 B. Exhaustion of State Remedies

20 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
21 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
22 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
23 opportunity to correct the state’s alleged constitutional deprivations. Coleman v. Thompson, 501
24 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.
25 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

26 A petitioner can satisfy the exhaustion requirement by providing the highest state court
27 with a full and fair opportunity to consider each claim before presenting it to the federal court.
28 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,

1 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair
2 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
3 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal
4 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).
5 Additionally, the petitioner must have specifically told the state court that he was raising a
6 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133
7 F.3d 1240, 1241 (9th Cir. 1998). For example, if a petitioner wishes to claim that the trial court
8 violated his due process rights "he must say so, not only in federal court but in state court."
9 Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general appeal to a constitutional guarantee is
10 insufficient to present the "substance" of such a federal claim to a state court. See Anderson v.
11 Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982) (Exhaustion requirement not satisfied circumstance
12 that the "due process ramifications" of an argument might be "self-evident."); Gray v.
13 Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 1074 (1996) ("a claim for relief in habeas corpus
14 must include reference to a specific federal constitutional guarantee, as well as a statement of the
15 facts which entitle the petitioner to relief.").

16 Additionally, the petitioner must have specifically told the state court that he was raising
17 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
18 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
19 Cir. 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
20 Supreme Court reiterated the rule as follows:

21 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
22 of state remedies requires that petitioners "fairly presen[t]" federal claims to the
23 state courts in order to give the State the "opportunity to pass upon and correct
24 alleged violations of the prisoners' federal rights" (some internal quotation marks
25 omitted). If state courts are to be given the opportunity to correct alleged violations
26 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
27 are asserting claims under the United States Constitution. If a habeas petitioner
28 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 only
in federal court, but in state court.

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

28 Our rule is that a state prisoner has not "fairly presented" (and thus

1 exhausted) his federal claims in state court *unless he specifically indicated to*
2 *that court that those claims were based on federal law. See Shumway v. Payne,*
3 *223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in*
4 *Duncan, this court has held that the petitioner must make the federal basis of the*
5 *claim explicit either by citing federal law or the decisions of federal courts, even*
6 *if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889*
(9th Cir. 1999) (*citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the*
underlying claim would be decided under state law on the same considerations
that would control resolution of the claim on federal grounds. *Hiivala v. Wood,*
195 F.3d 1098, 1106-07 (9th Cir. 1999); *Johnson v. Zenon*, 88 F.3d 828, 830-31
(9th Cir. 1996);

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

10 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

11 Respondent argues that Petitioner failed to exhaust his state judicial remedies because his
12 petition to the California Supreme Court was denied for procedural reasons, namely, the failure
13 to state adequate grounds for relief and attach supporting documentation, citing In re Swain, 34
14 Cal.2d 300, 304 (1949), and People v. Duvall, 9 Cal.4th 464, 474 (1995). Respondent is correct.

15 In re Swain articulates the procedural requirements that a California habeas petitioner
16 allege with particularity the facts supporting his claims and explain and justify the delay in the
17 presentation of those claims. In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). The Ninth
18 Circuit has held that an In re Swain citation is a denial on procedural grounds, because such a
19 deficiency, when it exists, can be cured in a renewed petition. Kim v. Villalobos, 799 F.2d 1317,
20 1319 (9th Cir. 1986); Harris v. Superior Court, 500 F.2d 1124, 1128, (9th Cir. 1974). Further,
21 Duvall reiterates the requirement that an application for habeas corpus "should both (i) state fully
22 and with particularity the facts on which relief is sought, as well as (ii) include copies of
23 reasonably available documentary evidence supporting the claim, including pertinent portions of
24 trial transcripts and affidavits or declarations." Duvall, 9 Cal.4th at 474 (citations omitted).

25 In Kim v. Villalobos, the Ninth Circuit stated that it was "incumbent" upon the district
26 court, in determining whether the federal standard of "fair presentation" of a claim to the state
27 courts had been met, to independently examine the petition presented to the California Supreme
28 Court. Kim, 799 F.2d at 1320. "The mere recitation of In re Swain does not preclude such

1 relief.” Id.

2 In the California Supreme Court, Petitioner contended that the Board of Prison Terms
3 hearing denied his procedural and substantive due process rights under the Fifth and Fourteenth
4 Amendment and Equal Protection under the Fourteenth Amendment. (Exhibit F, to Motion.)
5 Petitioner’s failure to submit a copy of the Board hearing transcript along with his petition was
6 sufficient justification for the state court to dismiss his petition under Duvall. Because Petitioner
7 could and should have alleged his claims with greater particularity by submission of a copy of the
8 transcript of his parole hearing, the state habeas corpus petition filed in the California Supreme
9 Court, did not satisfy the exhaustion requirement, and the instant petition must be dismissed.¹
10 Coleman v. Thompson, 501 U.S. at 731 (“This Court has long held that a state prisoner’s federal
11 habeas petition should be dismissed if the prisoner has not exhausted state remedies as to any of
12 his federal claims.”); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001) (“Once Rice moved for
13 dismissal, the district court was ‘obliged to dismiss immediately,’ as the petition contained no
14 exhausted claims.”) Therefore, the instant petition is unexhausted and must be dismissed.

15 In opposition, Petitioner requests that the Court stay the instant petition to allow him to
16 return to state court to exhaust his claims. In Rhines v. Weber, 544 U.S. 269, 277-278 (2005),
17 the Supreme Court held that a district court has discretion to stay a mixed petition to allow a
18 petitioner to present his unexhausted claims to the state court in the first instance and then to
19 return to federal court for review of his perfected petition. The Supreme Court noted that, while
20 the procedure should be “available only in limited circumstances,” it “likely would be an abuse
21 of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had
22 good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and
23 there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Id. at
24 278. The basis of the ruling in Rhines was premised on the fact that the petition was “mixed”
25 containing both exhausted and unexhausted claims.

26
27
28 ¹ On January 13, 2009, Respondent confirmed that Exhibit F, attached to its motion is a complete copy of
the petition filed in the California Supreme Court, which did not include any exhibits or attachments. (Court Doc.
32.)

Here, the Court is not presented with a “mixed” petition; rather, the instant petition contains only unexhausted claims. Therefore, the stay and abeyance procedure discussed in Rhines does not apply. In addition, the Ninth Circuit Court of Appeals pre-Rhines stay and abeyance procedure is likewise not applicable for the same reason. See Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir. 2007) (discussing the three-step-stay-and-abeyance procedure applicable to “mixed” petitions.). Accordingly, Petitioner’s motion for a stay of the proceedings should be denied.

RECOMMENDATION

Based on the foregoing, it is HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss the instant petition as unexhausted be GRANTED;
2. Petitioner's request to stay the proceedings be DENIED; and
3. The instant petition for writ of habeas corpus be DISMISSED, without prejudice.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 21, 2009

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE