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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT D. RICARDO,

Petitioner,

No. CIV S-08-2342 FCD EFB P

vs.

M. MARTEL, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss this action on the ground that petitioner failed to exhaust his state remedies. Petitioner moves to stay and abey his petition until he has exhausted his state court remedies. For the reasons explained below, the court finds that both motions must be denied.

I. Procedural History

Petitioner was convicted in the Solano County Superior Court of rape in concert, rape by the use of intoxicants, and rape of an unconscious victim. Resp.’s Mot. to Dism. (“Resp.’s Mot”), Ex. 1. He was sentenced to seven years in state prison. *Id.*

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1 Petitioner appealed to the California Court of Appeal, First Appellate District, which
2 affirmed the judgment on May 2, 2007. *Id.* He next filed a petition for review in the California
3 Supreme Court, which was denied on July 11, 2007. Resp.’s Mot., Ex. 2.

4 Petitioner filed a habeas petition in the Solano County Superior Court on June 11, 2008,
5 and a supplemental petition adding two claims on July 25, 2008, which were denied on August 7,
6 2008. Pet’r’s Reply and Mot. to Stay and Abey (“Pet’r’s Reply Mot.”), Ex. A; Resp.’s Mot., Ex.
7 3. Petitioner filed a habeas petition in the California Court of Appeal on August 26, 2008, and a
8 supplemental petition adding two claims on September 16, 2008, which were denied on
9 September 25, 2008. Pet’r’s Reply Mot., Ex. B; Resp.’s Mot., Ex. 3. In denying the petition, the
10 Court of Appeal wrote that, as to the claims contained in the supplemental petition, “[p]etitioner
11 does not demonstrate that he has exhausted his habeas remedy in the superior court
12 Accordingly, said claims are denied without prejudice to being raised in the first instance in the
13 sentencing court.” Pet’r’s Reply Mot., Ex. C. Petitioner then filed another habeas petition
14 containing the two claims in the Solano County Superior Court on October 15, 2008, which was
15 denied on December 15, 2008. *Id.*, Ex. D. Petitioner filed another habeas petition in the
16 California Court of Appeal on January 26, 2009, which was denied on January 29, 2009. *Id.*, Ex.
17 E. Finally, petitioner filed a habeas petition in the California Supreme Court on May 11, 2009.
18 *Id.* The petition was denied on October 14, 2009. *Ricardo (Robert D.) on H.C.*, 2009 Cal.
19 LEXIS 10811 (Cal. Oct. 14, 2009).

20 This petition was filed on October 3, 2008.

21 **II. Exhaustion of State Remedies**

22 A district court may not grant a petition for a writ of habeas corpus unless the petitioner
23 has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). Exhaustion of state
24 remedies requires that petitioners fairly present federal claims to the highest state court, either on
25 direct appeal or through state collateral proceedings, in order to give the highest state court “the
26 opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Duncan*

1 v. *Henry*, 513 U.S. 364, 365 (1995) (some internal quotations omitted). “[A] state prisoner has
2 not ‘fairly presented’ (and thus exhausted) his federal claims in state court unless he specifically
3 indicated to that court that those claims were based on federal law.” *Lyons v. Crawford*, 232
4 F.3d 666 (9th Cir. 2000), *amended by*, 247 F.3d 904 (9th Cir. 2000).

5 The court may stay a mixed petition, i.e., one containing exhausted and unexhausted
6 claims, to allow a petitioner to present unexhausted claims to the state courts. *Rhines v. Weber*,
7 544 U.S. 269, 277 (2005).

8 Respondent argues that petitioner has not exhausted his claims because the instant habeas
9 petition raises issues that were not raised in petitioner’s initial appeal to the California Court of
10 Appeal or his petition for review in the California Supreme Court. *See* Resp.’s Mot. at 2. But
11 respondent ignores the three petitions that petitioner filed in California courts on October 15,
12 2008, January 26, 2009, and May 11, 2009. Respondent’s motion to dismiss was filed on June
13 15, 2009, more than a month after the last of these petitions was filed. *Id.* at 3. Curiously, the
14 motion fails to mention these three petitions, even though petitioner had already filed copies of
15 the rulings on the first two petitions as exhibits to his May 5, 2009 motion to stay, in which he
16 wrote that he was “in the process of proceeding in the California Supreme court [sic] for his final
17 exhaustion [sic].” *See* Pet’r’s Reply Mot. at 2.

18 Petitioner has now filed with the court a copy of his petition to the California Supreme
19 Court raising all of the claims in the instant petition. *See Id.*, Ex. E. The California Supreme
20 Court denied his petition on October 14, 2009. *Ricardo (Robert D.) on H.C.*, 2009 Cal. LEXIS
21 10811. While petitioner’s claims may not have been exhausted at the time that he filed the
22 instant petition, they are now exhausted. *See Castro v. Long*, 2006 U.S. Dist. LEXIS 58923
23 (E.D. Cal. Aug. 17, 2006). Respondent’s motion to dismiss should be denied.

24 Petitioner moved the court to stay the instant petition and hold it in abeyance while he
25 exhausted his claims. Pet’r’s Reply Mot. at 2. As petitioner’s claims are now exhausted, this
26 request is moot. *See Genniro v. Salazar*, 2008 U.S. Dist. LEXIS 52903 (C.D. Cal. July 9, 2008).

1 Accordingly, it is hereby RECOMMENDED that:

2 1. Petitioner's May 5, 2009 motion to stay be denied;

3 2. Respondent's June 15, 2009 motion to dismiss be denied;

4 3. Respondent be directed to file and serve an answer, and not a motion, responding
5 to the application within 60 days from the date of this order, *see* Rule 4, Rules Governing
6 Section 2254 Cases, and that the answer be accompanied by any and all transcripts or other
7 documents relevant to the determination of the issues presented in the application, *see* Rule 5,
8 Rules Governing Section 2254 Cases;

9 4. Petitioner be directed that his reply, if any, shall be filed and served within 30
10 days of service of an answer.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
16 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
17 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: December 21, 2009

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20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
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