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

TIMOTHY L. MILLIGAN,

Petitioner,

No. CIV S-08-2766 MCE EFB P

vs.

PAM AHLIN, Warden,

Respondent.

ORDER

_____/

Petitioner, who is under an order of civil commitment and is not represented by counsel, seeks a writ of habeas corpus. *See* 28 U.S.C. § 2254. Currently pending is respondent’s motion to dismiss on the grounds that petitioner has not exhausted his state remedies. Petitioner opposes the motion. For the reasons explained below, the court finds that the petition contains both exhausted and unexhausted claims, and orders petitioner either to move for a stay and justify his failure to exhaust his unexhausted claims, or in the alternative, to file an amended petition with exhausted claims only.

I. Procedural History

Petitioner was found to be a sexually violent predator and was committed to the state Department of Mental Health for confinement at Coalinga State Hospital for an indefinite term. *People v. Milligan*, No. C056488, 2008 WL 2755232 at *1 (Cal. Ct. App. July 16, 2008).

1 Petitioner appealed the commitment order to the California Court of Appeal. *Id.* The Court of
2 Appeal issued an unpublished opinion affirming the judgment. *Id.* Petitioner filed a petition for
3 review in the California Supreme Court, which was denied. Resp.’s Mot. to Dism. (“Mot.”),
4 Docs. Lodg. in Support Thereof (“Lodg. Doc.”) 4, 5. Petitioner then filed the instant habeas
5 petition.

6 **II. Standards**

7 Respondent contends that petitioner has not exhausted his state remedies with respect to
8 two of the claims in his petition. *See* Mot. at 1. A district court may not grant a petition for a
9 writ of habeas corpus unless the petitioner has exhausted available state court remedies. 28
10 U.S.C. § 2254(b)(1).

11 Exhaustion of state remedies requires that petitioners fairly present federal claims to the
12 highest state court, either on direct appeal or through state collateral proceedings, in order to give
13 the highest state court “the opportunity to pass upon and correct alleged violations of its
14 prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (some internal quotations
15 omitted). A petitioner “has not ‘fairly presented’ (and thus exhausted) his federal claims in state
16 court unless he specifically indicated to that court that those claims were based on federal law.”
17 *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended by*, 247 F.3d 904 (9th Cir.
18 2000). “[T]he petitioner must make the federal basis of the claim explicit either by citing federal
19 law or the decisions of federal courts, even if the federal basis is self-evident...” *Id.* (citations
20 omitted); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (“a claim for relief in habeas
21 corpus must include reference to a specific federal constitutional guarantee, as well as a
22 statement of the facts that entitle the petitioner to relief”); *Duncan*, 513 U.S. at 365-66 (to
23 exhaust a claim, a state court “must surely be alerted to the fact that the prisoners are asserting
24 claims under the United States Constitution”). A state will not be deemed to have waived the
25 exhaustion requirement unless the state, through counsel, expressly waives the requirement. 28
26 U.S.C. § 2254(b)(3).

1 The court may stay a mixed petition, *i.e.*, one containing exhausted and unexhausted
2 claims, to allow a petitioner to present unexhausted claims to the state courts. *Rhines v. Weber*,
3 544 U.S. 269, 277 (2005). Stay and abeyance is appropriate when there was good cause for the
4 petitioner’s failure to exhaust his claims first in state court, his unexhausted claims are not
5 plainly meritless, and there is no indication that he engaged in intentionally dilatory litigation
6 tactics. *Id.* at 277.

7 **II. Analysis**

8 Respondent argues that petitioner has not exhausted the second and fourth claims in his
9 petition. Mot. at 3. Petitioner contends that he has exhausted his claims, yet concedes that the
10 fourth claim is based on new evidence that was not available at the time of his appeals. Pet’r’s
11 Opp’n to Mot. to Dism. (“Opp’n”) at 3. The court finds that petitioner has not exhausted either
12 claim.

13 The second claim in the instant petition is that petitioner’s due process rights were
14 violated when he was involuntarily committed based solely on evidence of past behavior,
15 without any evidence of a current mental disorder or a recent history of problems controlling
16 himself. Pet. at F. Petitioner raised a similar claim in his petition for review to the California
17 Supreme Court, writing that because “commitment of a sexually violent predator is based on the
18 defendant’s mental state at the time of commitment” then courts should take into account
19 evidence of “any signs and symptoms from which the alleged SVP is suffering *at that time* . . . in
20 lieu of the current forensic model of historical evidence.” Lodg. Doc. 4 at 16-17 (emphases in
21 original). However, petitioner failed to specifically indicate to the California Supreme Court that
22 this claim was based on federal law. He did not cite any federal authority or even use the term
23 “due process” in this section of his state petition. *See id.* Therefore petitioner’s second claim
24 has not been fairly presented to the California Supreme Court, and is unexhausted.

25 Petitioner’s fourth claim is that his due process rights were violated by the use in his case
26 of a “structured risk assessment instrument,” the Static-99, that dramatically over predicted his

1 risk of recidivism. Opp'n at 3; Pet. at G. Petitioner did not include this claim in his state
2 petition. However, it appears that he could not have included it, because his petition for review
3 in the California Supreme Court was filed in August of 2008, whereas the Static-99 may not
4 have not discredited until October. See Lodg. Doc. 4 at 32; Pet. at F-G (describing October 2008
5 presentation on the Static-99's inaccuracy). Accordingly, petitioner's fourth claim is also
6 unexhausted, but there may be good cause for his failure to exhaust.

7 As noted, the court may stay this action and hold it in abeyance while petitioner presents
8 his two unexhausted claims to the California courts. *Rhines*, 544 U.S. at 277-78. However,
9 petitioner carries the burden of demonstrating that he has good cause for his failure to exhaust,
10 that the unexhausted claims potentially have merit and that petitioner has not engaged in
11 intentionally dilatory litigation tactics. *Id.*

12 Accordingly, it is hereby ORDERED that:

13 1. Petitioner has 30 days from the date of this order to file an amended petition including
14 exhausted claims only, or file a motion explaining why this court should stay this action and hold
15 it in abeyance while he exhausts his unexhausted claims in state court. The motion to stay must
16 address the *Rhines* factors described above. Petitioner's failure to comply with this order will
17 result in a recommendation that this action be dismissed without prejudice.

18 2. The Clerk of the Court is directed to terminate docket entry number 13.

19 Dated: February 3, 2010.

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21 EDMUND F. BRENNAN
22 UNITED STATES MAGISTRATE JUDGE
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