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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN STEELE,
Petitioner,
v.
JOHN N. KATAVICH, Warden,
Respondent.

No. 2:15-cv-1836 TLN KJN P
FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner, proceeding pro se, with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2012 conviction on human trafficking, pandering, pimping, criminal threats, oral copulation by force, kidnapping, abduction of a minor for prostitution, and assault by means of force likely to produce great bodily injury. Respondent moved to dismiss the petition for failure to exhaust state remedies. Despite being granted multiple extensions of time, petitioner did not file an opposition or renew his motion for stay. As set forth below, respondent’s motion to dismiss should be granted.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondents’ counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion,

¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
2 providing the highest state court with a full and fair opportunity to consider all claims before
3 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
4 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

5 The state court has had an opportunity to rule on the merits when the petitioner has fairly
6 presented the claim to that court. The fair presentation requirement is met where the petitioner
7 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at
8 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were
9 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.
10 Harless, 459 U.S. 4, 6 (1982). Instead,

11 [i]f state courts are to be given the opportunity to correct alleged
12 violations of prisoners’ federal rights, they must surely be alerted to
13 the fact that the prisoners are asserting claims under the United
14 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
only in federal court, but in state court.

15 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus
16 must include reference to a specific federal constitutional guarantee, as well as a statement of the
17 facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 116 S. Ct. 2074,
18 2081 (1996). The United States Supreme Court has held that a federal district court may not
19 entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with
20 respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982). A mixed petition
21 containing both exhausted and unexhausted claims must be dismissed. Id. at 522.

22 Petitioner raises twelve claims in his petition: (1) illegally sentenced (three strikes does
23 not apply); (2) ineffective assistance of counsel; (3) coerced statement by officers; (4) evidence
24 tampering; (5) prosecutorial misconduct; (6) insufficient evidence; (7) violation of California
25 Penal Code § 654; (8) “giving jury instructions that should not have been applied;” (9) “Violation
26 of multiple constitutional rights;” (10) “Violation of hearsay rule;” (11) “Not being able to
27 impeach witnesses’ credibility;” and (12) “Miranda violation.” (ECF No. 4 at 4, 5, 7-8.)

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1 Petitioner filed no collateral challenges in state court. In his petition for review in the
2 California Supreme Court, petitioner raised five claims: (1) “Petition for review should be
3 granted to determine the meaning and scope of Penal Code section 267;” (2) “Petition for review
4 should be granted in order to clarify the scope of CALCRIM No. 1190, the non-corroboration [sic]
5 instruction;” (3) “Petition for review should be granted to determine the due process implication
6 of improper invocations of procedural default;” (4) “Petition for review should be granted to
7 determine the scope of Penal Code section 654 on the facts of this case;” and (5) “Petition for
8 review should be granted to determine the proper manner of having ‘blind’ issues reviewed on
9 appeal.” (Respondent’s Lodged Doc. 3.)

10 Liberally construing the instant petition, it appears that three claims were exhausted
11 because they were encompassed in claims one, two, four, and five of the petition for review:
12 claim (7) 654 violation; claim (8) jury instructions; and claim (11) not being able to impeach
13 witnesses’ credibility. Petitioner’s other nine claims in the instant petition are unexhausted
14 because such claims were not presented to the California Supreme Court.

15 In response to the request for petitioner’s reasons why he had not presented any claims to
16 any other court, petitioner responded that his “appeal lawyer said he could only bring up these
17 issues after direct appeal only.” (ECF No. 4 at 5.) In his earlier motion for stay, petitioner did
18 not provide facts or argument in support of his motion for stay, and appeared to concede that he
19 failed to exhaust his state court remedies.² (ECF No. 15.) Petitioner was granted multiple
20 opportunities to oppose respondent’s motion on exhaustion grounds. (ECF No. 20, 22, 24, 26.)
21 On October 24, 2016, petitioner sought an additional seven days in which to file an opposition
22 and a motion for stay. (ECF No. 27.) On November 16, 2016, petitioner’s request was granted,
23 and he was warned that failure to comply with the court’s order would result in an order granting

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25 ² Moreover, petitioner did not address the statute of limitations. Respondent argued that allowing
26 petitioner to exhaust any unexhausted claims would now be futile because the statute of
27 limitations has run with regard to the unexhausted claims, citing *Jiminez v. Rice*, 276 F.3d 478,
28 482 (9th Cir. 2011) (because petitioner filed his state habeas petition after the AEDPA statute of
limitations ended, the delay “resulted in an absolute time bar to refile after his state claims were
exhausted”). (ECF No. 11 at 4.) Here, the federal limitations period expired on September 10,
2015. (ECF No. 18 at 4.)

1 respondent's motion to dismiss, and that no additional extensions of time would be granted.
2 More than seven days have now passed, and petitioner did not file an opposition or renew his
3 motion for stay.


4 After reviewing the record in this action, the court finds that petitioner has failed to
5 exhaust state court remedies as to claims (1) through (6), (9), (10), and (12). Accordingly, the
6 petition is a mixed petition containing both exhausted and unexhausted claims and must be
7 dismissed. Petitioner should be granted thirty days to file an amended petition raising only
8 exhausted claims (7) 654 violation; (8) jury instructions; and (11) not being able to impeach
9 witnesses' credibility.

10 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 11 1. Respondent's motion to dismiss (ECF No. 11) be granted;
- 12 2. Petitioner's petition for a writ of habeas corpus (ECF No. 4) be dismissed; and
- 13 3. Within thirty days from any order adopting these findings and recommendations,
14 petitioner be directed to file an amended petition raising only his exhausted claims (7), (8), and
15 (11). Petitioner is cautioned that failure to file such amended petition will result in a
16 recommendation that this action be dismissed. Rose v. Lundy, 455 U.S. 509 (1982).

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
19 after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
22 objections shall be served and filed within fourteen days after service of the objections. The
23 parties are advised that failure to file objections within the specified time may waive the right to
24 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 Dated: December 6, 2016

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28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE