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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH WAYNE ROBERSON,

Petitioner,

v.

WARDEN OF CALIFORNIA STATE
PRISON, SOLANO,

Respondent.

No. 2:17-cv-0531 MCE AC P

FINDINGS & RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Currently before the court is respondent’s motion to dismiss the petition as wholly unexhausted. ECF No. 14.

I. Factual and Procedural Background

On September 28, 2015, a jury convicted petitioner of possession of ammunition by a felon and he admitted to allegations that he had previous strike offenses. ECF No. 1 at 1; Lod. Doc. 1; Lod. Doc. 2. Petitioner was sentenced to a determinate state prison term of six years: three years for the offense, plus three years for the prior strike enhancement. ECF No. 1 at 1; Lod. Doc. 2.

A. Direct Review

Petitioner appealed his conviction to the California Court of Appeal, Third Appellate District. ECF No. 1 at 2. At the time he filed the petition, he stated that his petition was still

1 pending. ECF No. 1 at 2. On October 18, 2017, the court of appeal reversed petitioner's strike
2 conviction enhancement, vacated his sentence, and remanded the matter to the trial court for
3 retrial of the strike allegations and resentencing. Lod. Doc. 2.

4 According to the Third Appellate District's case information website, petitioner recently
5 filed another notice of appeal in his criminal case.¹ His opening brief is currently due October 15,
6 2018.²

7 B. State Collateral Review

8 Petitioner filed a petition for writ of habeas corpus in superior court on September 25,
9 2015, which was denied on the same day. ECF No. 1 at 3, 26-27.

10 According to the Third Appellate District's case information website, petitioner has filed
11 four petitions for writ of habeas corpus since filing the petition in this case and the dockets in
12 those cases reflect that they were each denied within about a week of being filed.

13 C. Federal Petition

14 The petition in this case was filed on March 8, 2017. ECF No. 1. On screening the
15 petition, the court noted that it appeared to be fully unexhausted and petitioner was given an
16 opportunity to either (1) notify the court that state court remedies were exhausted or unavailable
17 or (2) move for a stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005). ECF No. 6.
18 Petitioner moved for a stay (ECF No. 7), but failed to address the factors necessary to obtain a
19 Rhines stay, resulting in the motion being denied without prejudice (ECF No. 8). Petitioner was
20 given thirty days to file a motion for stay that addressed the three Rhines factors, and warned that
21 failure to do so would result in the petition being served without a stay and his petition would be
22 subject to dismissal unless respondent waived the exhaustion requirement. Id. After petitioner
23

24 ¹ Docket for California Court of Appeal Case No. C087680:
25 http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2258977&doc_no=C087680&request_token=NiIwLSIkXkw2W1BFSCI9SEJJUEQ6UTxbKyMuXzJTMCAgCg%3D%3D.

26 ² Brief deadline for California Court of Appeal Case No. C087680:
27 http://appellatecases.courtinfo.ca.gov/search/case/briefing.cfm?dist=3&doc_id=2258977&doc_no=C087680&request_token=NiIwLSIkXkw2W1BFSCI9SEJJUEQ6UTxbKyMuXzJTMCAgCg%3D%3D.

1 failed to file a motion for stay, respondent was ordered to respond to the petition (ECF No. 9) and
2 filed a motion to dismiss (ECF No. 14).

3 II. Motion to Dismiss

4 Respondent seeks dismissal on grounds the petition is wholly unexhausted. ECF No. 14.
5 In response to the motion, petitioner has filed two “motions to seek relief from procedural
6 default.” ECF Nos. 18, 19. Though not identical, the motions are substantially similar. Both
7 motions, rather than responding to the argument that the petition is unexhausted, instead request
8 that petitioner be relieved from procedural default caused by ineffective assistance of trial
9 counsel; petitioner then proceeds to argue the merits of his petition. Id. Petitioner’s motions
10 conclude by requesting that respondent’s motion to dismiss be denied. Id.

11 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
12 writ of habeas corpus unless “there is an absence of available State corrective process” or
13 circumstances make the process ineffective to protect a petitioner’s rights. 28 U.S.C.
14 § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent’s counsel.
15 28 U.S.C. § 2254(b)(3).³ A waiver of exhaustion, thus, may not be implied or inferred. A
16 petitioner satisfies the exhaustion requirement by providing the highest state court with a full and
17 fair opportunity to consider all claims before presenting them to the federal court. Picard v.
18 Connor, 404 U.S. 270, 275-76 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985)
19 (citation omitted). A habeas petitioner bears the burden of proving he has exhausted his state
20 court remedies, Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam) (citation
21 omitted), and petitioner has not met his burden.

22 It is clear from the petition that petitioner has not exhausted his state court remedies (ECF
23 No. 1 at 2-13), and the California Supreme Court’s online docket continues to show no signs of a
24 direct or collateral appeal filed by petitioner. To the extent petitioner may be attempting to argue
25 that his claims are procedurally defaulted and therefore technically exhausted because state
26 remedies are no longer available, there is no evidence of procedural default. Moreover, it appears

27 ³ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. §
28 2254(b)(2).

1 unlikely that petitioner's claims are procedurally defaulted as he is actively pursuing state court
2 remedies.

3 III. Certificate of Appealability

4 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must
5 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A
6 certificate of appealability may issue only "if the applicant has made a substantial showing of the
7 denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

8 When a petition is dismissed on procedural grounds, as is being recommended in this
9 case, a certificate of appealability "should issue when the prisoner shows, at least, [(1)] that jurists
10 of reason would find it debatable whether the petition states a valid claim of the denial of a
11 constitutional right and [(2)] that jurists of reason would find it debatable whether the district
12 court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This
13 court finds that no jurist of reason would find it debatable that the petition is unexhausted and a
14 certificate of appealability should not issue.

15 Accordingly, IT IS HEREBY RECOMMENDED that:

16 1. Respondent's motion to dismiss (ECF No. 14) be granted and the petition be
17 dismissed as unexhausted.

18 2. This court decline to issue the certificate of appealability referenced in 28 U.S.C.
19 § 2253.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
25 objections shall be filed and served within fourteen days after service of the objections. The


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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 25, 2018

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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