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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER M. LULL,  
Petitioner,  
v.  
PEOPLE OF THE STATE OF  
CALIFORNIA,  
Respondent.

No. 2:17-cv-1673-MCE-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner, proceeding without counsel, is seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion (ECF No. 7) and amended motion<sup>1</sup> to dismiss (ECF No. 9) which argues that petitioner failed to exhaust his claims in state court. Petitioner has responded to the motion (ECF No. 11) and respondent has filed a reply (ECF No. 12). After review of the pleadings, the court recommends that respondent’s amended motion be granted.

I. Procedural Background

Petitioner was convicted of misdemeanor violations of California Vehicle Code Sections 23152(a) and 23152(b). He was sentenced to a ninety-six hour prison sentence and, as of January 20, 2016, is on a three year term of informal probation. Lodg. Doc. 1.<sup>2</sup>

<sup>1</sup> The amendment corrected citations to documents submitted with the motion.

<sup>2</sup> Respondent has lodged these documents in paper alongside its motion to dismiss. The

1 On July 28, 2017, the Placer County Superior Court Appellate Division affirmed  
2 petitioner's conviction. *Id.* He did not seek review of that decision from the California Court of  
3 Appeal. The instant petition was filed on August 11, 2017. ECF No. 1.

4 II. Applicable Legal Standards

5 A. Motion to Dismiss

6 In the context of federal habeas claims, a motion to dismiss is construed as arising under  
7 Rule 4 of the Rules Governing Section 2254 in the United States District Courts which "explicitly  
8 allows a district court to dismiss summarily the petition on the merits when no claim for relief is  
9 stated." *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (quoting *Gutierrez v. Griggs*,  
10 695 F.2d 1195, 1198 (9th Cir. 1983)). Accordingly, a respondent is permitted to file a motion to  
11 dismiss after the court orders a response, and the court should use Rule 4 standards in reviewing  
12 the motion. *See Hillery v. Pulley*, 533 F. Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982). Rule 4  
13 specifically provides that a district court may dismiss a petition if it "plainly appears from the  
14 face of the petition and any exhibits annexed to it that petitioner is not entitled to relief in the  
15 district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases. As noted supra, the court  
16 may also take judicial notice of court records and does so here. *See Porter v. Ollison*, 620 F.3d  
17 952, 954-55 (9th Cir. 2010).

18 B. Exhaustion

19 Generally, exhaustion requires that a petitioner's claims be presented to the highest court  
20 in a state system. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845-47 (1999). However, with  
21 respect to misdemeanants, the Ninth Circuit has held that convictions should first be appealed to  
22 the appellate division of the superior court in which the misdemeanor was convicted. *See*  
23 *McMonagle v. Meyer*, 802 F.3d 1093, 1096, 1099 (9th Cir. 2015). If the conviction is affirmed  
24 by the appellate division, the misdemeanor may then request certification of the case for transfer  
25 to the California Court of Appeal for further review. *Id.* If the transfer request is denied, then the

26  
27 court may take judicial notice of court records and does so here. *See Porter v. Ollison*, 620 F.3d  
28 952, 954-55 (9th Cir. 2010). Accordingly, the documents are properly considered in addressing  
this motion to dismiss.

1 misdemeanor has fully exhausted. *Id.* The *McMonagle* court also noted, however, that  
2 ineffective assistance of counsel claims should be raised and exhausted via state collateral  
3 proceedings. *Id.* at 1099 n. 1.

4 III. Analysis

5 Respondent argues that petitioner failed to request certification to transfer his case to the  
6 California Court of Appeal and, thus, failed to exhaust his claims. The court agrees. Petitioner  
7 offers neither argument nor evidence that he requested such a transfer. Instead, he simply states  
8 that his Fourth Amendment seizure of evidence claim has already been exhausted, though he  
9 offers no satisfactory explanation (or relevant documentation) for how this is so. ECF No. 11 at  
10 5. Petitioner does state that ineffective assistance of counsel prejudiced his pursuit of exhaustion  
11 by way of failing to raise certain arguments in his appeal to the superior court's appellate division  
12 (*id.*), but this argument is unavailing. *See, e.g., Hernandez v. California*, No. C08-4085, 2010  
13 U.S. Dist. LEXIS 54118, 2010 WL 1854416, at \*2 (N.D. Cal. May 6, 2010) (finding appellate  
14 counsel's refusal to present claims on appeal is common occurrence of everyone with  
15 unexhausted claims)<sup>3</sup>; *see also Gray v. Ryan*, 2010 U.S. Dist. LEXIS 127468, 2010 WL 4976953  
16 at \*4 (S.D. Cal. 2010). And, in any event, petitioner did not request a transfer for the denial of  
17 self-representation claim which he *did* raise before the superior court appellate division. *See* ECF  
18 No. 1 at 17. Thus, none of petitioner's claims are exhausted.

19 Finally, petitioner is not excused from exhaustion by an argument that it is now too late to  
20 present his claims in state court. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) ("The  
21 purposes of the exhaustion requirement, we said, would be utterly defeated if the prisoner were  
22 able to obtain federal habeas review simply by 'letting the time run' so that state remedies were  
23 no longer available.").

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27 <sup>3</sup> Additionally, as respondent points out in their reply, petitioner could have raised his  
28 ineffective assistance claim by way of a habeas petition to the California Supreme Court. He has  
not done so, however.

1 IV. Conclusion

2 Accordingly, it is RECOMMENDED that respondent's motion to dismiss (ECF No. 9) be  
3 GRANTED and the petition be dismissed without prejudice as unexhausted.

4 These findings and recommendations are submitted to the United States District Judge  
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
6 after being served with these findings and recommendations, any party may file written  
7 objections with the court and serve a copy on all parties. Such a document should be captioned  
8 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
9 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
10 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
11 his objections petitioner may address whether a certificate of appealability should issue in the  
12 event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing § 2254 Cases  
13 (the district court must issue or deny a certificate of appealability when it enters a final order  
14 adverse to the applicant).

15 DATED: July 12, 2018.

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17 EDMUND F. BRENNAN  
18 UNITED STATES MAGISTRATE JUDGE  
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