



1           **II.     Analysis**

2           A district court may not grant a petition for a writ of habeas corpus unless the petitioner  
3 has exhausted available state court remedies. 28 U.S.C. § 2254(b)(1). A state will not be deemed  
4 to have waived the exhaustion requirement unless the state, through counsel, expressly waives the  
5 requirement. 28 U.S.C. § 2254(b)(3).

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

20           In addition to identifying the federal basis of his claims in the state court, the petitioner  
21 must also fairly present the factual basis of the claim in order to exhaust it. *Baldwin v. Reese*, 541  
22 U.S. 27, 29 (2004); *Robinson v. Schriro*, 595 F.3d 1086, 1101 (9th Cir. 2010). “[T]he petitioner  
23 must . . . provide the state court with the operative facts, that is, ‘all of the facts necessary to give  
24 application to the constitutional principle upon which [the petitioner] relies.’” *Davis v. Silva*, 511  
25 F.3d 1005, 1009 (9th Cir. 2008) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.  
26 1958)).

27           Where a federal habeas petitioner has failed to exhaust a claim in the state courts  
28 according to these principles, a court will generally dismiss the petition without prejudice,

1 allowing the petitioner to return to state court to exhaust the claim and then refile the federal  
2 petition. *Rhines v. Weber*, 544 U.S. 269, 274 (2005). Alternatively, the petitioner may ask the  
3 federal court to stay its consideration of the petition while she returns to state court to complete  
4 exhaustion. Two procedures may be used in staying a petition — one provided for by *Kelly v.*  
5 *Small*, 315 F.3d 1063 (9th Cir. 2002) and the other by *Rhines*. *King v. Ryan*, 564 F.3d 1133,  
6 1138-41 (9th Cir. 2009). Under the *Kelly* procedure, the district court may stay a petition  
7 containing only exhausted claims and hold it in abeyance pending exhaustion of additional claims  
8 which may then be added to the petition through amendment. *Kelly*, 315 F.3d at 1070-71; *King*,  
9 564 F.3d at 1135. If the federal petition contains both exhausted and unexhausted claims (a so-  
10 called “mixed” petition), a petitioner seeking a stay under *Kelly* must first dismiss the  
11 unexhausted claims from the petition and seek to add them back in through amendment after  
12 exhausting them in state court. *King*, 564 F.3d at 1138-39. The previously unexhausted claims,  
13 once exhausted, must be added back into the federal petition within the statute of limitations  
14 provided for by 28 U.S.C. § 2244(d)(1), however. *King*, 564 F.3d at 1140-41. Under that statute,  
15 a one-year limitation period for seeking federal habeas relief begins to run from the latest of the  
16 date the judgment became final on direct review, the date on which a state-created impediment to  
17 filing is removed, the date the United States Supreme Court makes a new rule retroactively  
18 applicable to cases on collateral review or the date on which the factual predicate of a claim could  
19 have been discovered through the exercise of due diligence. 28 U.S.C. § 2241(d)(1). A federal  
20 habeas petition does not toll the limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v.*  
21 *Walker*, 533 U.S. 167, 181-82 (2001).

22 Under *Rhines*, a district court may stay a mixed petition in its entirety, without requiring  
23 dismissal of the unexhausted claims, while the petitioner attempts to exhaust them in state court.  
24 *King*, 564 F.3d at 1139-40. Unlike the *Kelly* procedure, however, *Rhines* requires that the  
25 petitioner show good cause for failing to exhaust the claims in state court prior to filing the  
26 federal petition. *Rhines*, 544 U.S. at 277-78; *King*, 564 F.3d at 1139. In addition, a stay pursuant  
27 to *Rhines* is inappropriate where the unexhausted claims are “plainly meritless” or where the  
28 petitioner has engaged in “abusive litigation tactics or intentional delay.” *Id.* The Ninth Circuit

1 has held that the petitions raising entirely unexhausted claims may also be stayed under the  
2 *Rhines* procedure. *Mena v. Long*, 813 F.3d 907, 910 (9th Cir. 2016).

3 Petitioner raises five claims in this case: (1) illegal search and seizure; (2) ineffective  
4 assistance of counsel; (3) exclusion of exculpatory evidence; (4) denial of the right to a speedy  
5 trial; and (5) denial of a fair trial in various other ways, including violation of the right to confront  
6 adverse witnesses. ECF No. 1 at 4-5. In his fifth claim, petitioner includes the phrase “cruel and  
7 unusual punishment” although the body of the petition does not elaborate on this claim. *Id.* at 5.  
8 In his sole filing in the California Supreme Court, petitioner argued that the trial court had abused  
9 its discretion in refusing to strike one of his prior convictions and that the sentence was so long as  
10 to amount to cruel and unusual punishment. ECF No. 12-3. Thus, all of petitioner’s instant  
11 claims other than his possible claim that his sentence amounts to cruel and unusual punishment  
12 have not been presented to the California Supreme Court.

13 Petitioner has not contested that fact, nor has he asked the court for a stay of these  
14 proceedings under either *Kelly* or *Rhines* so that he may present the unexhausted claims to the  
15 state high court. Accordingly, the petition contains unexhausted claims and must be dismissed.  
16 Petitioner must be given the opportunity to file an amended petition containing only the  
17 exhausted claim. *Kelly v. Small*, 315 F.3d 1063, 1069-70 (9th Cir. 2002) (where a federal habeas  
18 petition contains both exhausted and unexhausted claims, the court must give the petitioner an  
19 opportunity to dismiss the unexhausted claims and proceed on the others).

### 20 **III. Recommendation**

21 It is therefore RECOMMENDED that respondent’s February 8, 2022 motion to dismiss  
22 (ECF No. 11) be GRANTED and the petition dismissed with leave to amend to file a petition  
23 containing only exhausted claims.

24 These findings and recommendations are submitted to the United States District Judge  
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
26 after being served with these findings and recommendations, any party may file written  
27 objections with the court and serve a copy on all parties. Such a document should be captioned  
28 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: June 15, 2022.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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