

**\*E-FILED - 3/18/09\***

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

RUBEN LOPEZ,	)	No. C 08-2489 RMW (PR)
	)	
Petitioner,	)	ORDER GRANTING
	)	RESPONDENT'S MOTION TO
vs.	)	DISMISS; DIRECTING
	)	PETITIONER TO FILE AMENDED
EDMUND G. BROWN,	)	PETITION OR REQUEST FOR
	)	STAY
Respondent.	)	(Docket No. 8)

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent filed a motion to dismiss the petition for petitioner's failure to exhaust state remedies. Petitioner has not filed an opposition. Having reviewed the papers, the court GRANTS respondent's motion to dismiss.

**BACKGROUND**

Petitioner was sentenced to twenty-five years-to-life in state prison after being convicted of driving with wilful and wanton disregard for the safety of persons and property while fleeing a peace officer, driving under the influence, and driving with a blood alcohol level of .08 percent or more. Petitioner admitted four prior "strike" offenses and three prior prison terms. Petitioner filed a direct appeal to the court of appeal and a petition for review in the state supreme court.

1 The instant petition was filed on May 15, 2008.

## 2 **DISCUSSION**

3 Respondent moves to dismiss the petition on the ground it is unexhausted because  
4 petitioner did not fairly present three of his four claims for review to the state courts. In his  
5 § 2254 petition, petitioner raised the following claims: (1) the evidence was insufficient to  
6 support his conviction for wilful and wanton disregard for the safety of persons and property  
7 while fleeing a peace officer because he lacked specific intent to flee; (2) CALJIC 12.85 contains  
8 an unconstitutional mandatory presumption that violated due process; (3) counsel was ineffective  
9 because (a) he failed to object to the opinion of the police officer and several improper  
10 statements of the prosecutor, (b) he failed to argue the effects of prescription medicine combined  
11 with alcohol, (c) he failed to object to prosecutorial misconduct, and (d) he failed to request a  
12 video of the alleged pursuit or stop; and (4) the three-strikes law is unconstitutional and violates  
13 equal protection.

14 Prisoners in state custody who wish to challenge collaterally in federal habeas  
15 proceedings either the fact or length of their confinement are first required to exhaust state  
16 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the  
17 highest state court available with a fair opportunity to rule on the merits of each and every claim  
18 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The exhaustion-of-state-  
19 remedies doctrine reflects a policy of federal-state comity to give the state “the initial  
20 ‘opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.’” Picard  
21 v. Connor, 404 U.S. 270, 275 (1971) (citations omitted). The exhaustion requirement is satisfied  
22 only if the federal claim has been “fairly presented” to the state courts. See id.; Peterson v.  
23 Lampert, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc).

24 As a general rule, a petitioner satisfies the exhaustion requirement by fairly presenting  
25 the federal claim to the appropriate state courts in the manner required by the state courts,  
26 thereby affording the state courts a meaningful opportunity to consider allegations of legal error.  
27 Casey v. Moore, 386 F.3d 896, 915-16 (9th Cir. 2004). In order to fairly present a claim, it is not  
28 sufficient to raise only the facts supporting the claim; rather, “the constitutional claim . . .

1 inherent in those facts” must be brought to the attention of the state court. See Picard, 404 U.S.  
2 at 277. State courts must be alerted to the fact that prisoners are asserting claims under the  
3 United States Constitution in order to be given the opportunity to correct alleged violations of  
4 federal rights. Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

5 There is no dispute that petitioner presented Claim #2 to the California Supreme Court in  
6 his April 9, 2007 petition for review. (Mot., Ex. A, p. 29-34.) There is also no dispute that  
7 petitioner did not present Claim #4 to the California Supreme Court in his April 9, 2007 petition  
8 for review. (Mot., p. 7; Petition, p. 11.) Respondent argues, however, that petitioner’s petition  
9 for review also did not fairly present Claim #1 or Claim #3 to the California Supreme Court.  
10 (Mot., p. 6-7.)

11 A. Claim #1 -- Insufficiency of the Evidence

12 A review of petitioner’s petition for review to the California Supreme Court reveals a  
13 claim of insufficiency of the evidence. (Mot., Ex. A, p. 23-25.) However, as respondent notes,  
14 petitioner’s claim before the state court was one of whether sufficient evidence existed that the  
15 officer had turned on the required police light as mandated by statute, not whether there was  
16 sufficient evidence that petitioner possessed the requisite specific intent to flee. (Id.) In  
17 petitioner’s federal habeas petition, although Claim #1 is also an insufficiency of the evidence  
18 claim, none of the factual bases underlying that claim is the one stated in the insufficiency of the  
19 evidence claim presented in the petition for review to the California Supreme Court.

20 In petitioner’s petition for review, he also raised a claim that the trial court improperly  
21 admitted petitioner’s prior 2001 conviction to prove the specific intent element in petitioner’s  
22 underlying charge. (Mot., Ex. A., p. 15-22.) Although the underlying facts of this claim are  
23 similar to those expressed in petitioner’s Claim #1 in his federal petition, the actual legal theory  
24 presented to the state court was not insufficiency of the evidence, such as was presented to this  
25 court. Accordingly, the court concludes that Claim #1 is unexhausted. See Kelly v. Small, 315  
26 F.3d 1063, 1068-69 (9th Cir. 2003) (finding unexhausted ineffective assistance of counsel and  
27 prosecutorial misconduct claims where specific instances of ineffectiveness and misconduct  
28 asserted in federal petition were neither in the California Supreme Court petition nor discussed

1 by the court of appeal), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir.  
2 2007); Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999) (stating a claim is exhausted  
3 when the petitioner presents the issue's factual and legal basis to the state's highest court).

4 B. Claim #3 -- Ineffective Assistance of Counsel

5 A review of petitioner's petition for review to the California Supreme Court reveals a  
6 claim of ineffective assistance of counsel. (Mot., Ex. A, p. 26-28.) However, as respondent  
7 notes, petitioner's claim before the state court only argued that counsel was ineffective for  
8 failing to object to the prosecutor's rebuttal argument that lowered the standard of proof of  
9 "beyond a reasonable doubt." (Id. at p. 27.) In petitioner's federal habeas petition, although  
10 Claim #3 is also an ineffective assistance of counsel claim, none of the factual bases underlying  
11 that claim is the one stated in the ineffective assistance of counsel claim presented in the petition  
12 for review to the California Supreme Court. See Kelly, 315 F.3d at 1068-69. Accordingly, the  
13 court concludes that Claim #3 is unexhausted.

14 Having concluded that petitioner did not exhaust three of his four claims, the court  
15 GRANTS respondent's motion to dismiss the petition as a "mixed" petition that contains both  
16 exhausted and unexhausted claims. See Rhines v. Weber, 544 U.S. 269, 273 (2005). Before  
17 entering a judgment of dismissal, however, the court must provide petitioner an opportunity to  
18 amend the mixed petition by striking his unexhausted claims as an alternative to suffering  
19 dismissal. Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005) (citing Rhines, 544 U.S. at  
20 277). As a further alternative, the court may stay the mixed petition while petitioner returns to  
21 state court to exhaust his unexhausted claim. See Rhines, 544 U.S. at 277. Accordingly,  
22 petitioner may choose either to amend his petition and proceed only with his exhausted claim, or  
23 request a stay of the petition while he exhausts his unexhausted claims in state court. A stay will  
24 not be granted, however, unless petitioner can show there was good cause for his failure to  
25 exhaust his unexhausted claims, Claim #1, #3, and #4, in state court. See id. The court will  
26 address the merits of the claim following petitioner's election below, and resolution of the  
27 exhaustion issue.

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1 **CONCLUSION**

2 For the reasons stated above, the Court hereby orders as follows:

3 1. Respondent's motion to dismiss (docket no. 8) is GRANTED.

4 2. No later than **thirty (30) days** from the date of this order, petitioner shall either:

5 (1) file an amended petition that includes only his exhausted claim and strikes the unexhausted  
6 claims, or (2) file a request for a stay of this matter while he exhausts his unexhausted claims in  
7 state court.

8 3. If petitioner chooses to file an amended petition, he must include the caption and civil  
9 case number used in this order, No. C-08-2489 RMW (PR), as well as the words FIRST  
10 AMENDED PETITION on the first page; petitioner shall not incorporate material from the  
11 original petition by reference.

12 4. If petitioner fails to file either an amended petition or a request for a stay as ordered  
13 herein, the petition will be dismissed without prejudice to petitioner's later filing a new petition  
14 that contains only exhausted claims.

15 This order terminates docket no. 8.

16 IT IS SO ORDERED.

17 DATED: 3/16/09

  
RONALD M. WHYTE  
United States District Judge