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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEREK L. CORDEIRO,

Petitioner,

vs.

ROBERT J. HERNANDEZ, Warden; and
EDMUND GERALD BROWN, JR., the
Attorney General of the State of
California,

Respondents.

CASE NO. 08-CV-01519-H (CAB)

ORDER DENYING:

**(1) RESPONDENTS' MOTION
TO DISMISS
(Doc. 31.)**

AND

**(2) PETITIONER'S MOTION
(Doc. 35.)**

On August 18, 2008, Petitioner Derek Cordeiro ("Petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for two counts of lewd and lascivious acts upon a minor, one count of indecent exposure, and one count of child annoyance. (Doc. No. 1 at 36.) On April 20, 2009, Petitioner filed an amended petition. (Doc. No. 28.) On June 17, 2009, Respondents filed a motion to dismiss Petitioner's petition for failure to exhaust state court remedies on six of the seven claims in Petitioner's amended petition. (Doc. No. 31.) On July 24, 2009, Petitioner filed a response in opposition to Respondents' motion to dismiss with an attachment indicating all claims exhausted in state court. (Doc. No. 33., Ex. C) On August 4, 2009,

1 Petitioner filed a motion concerning his mail. (Doc. No. 35.) On December 4, 2009, the
2 magistrate judge issued a Report and Recommendation that the Court deny Respondents'
3 motion to dismiss and deny Petitioner's motion. (Doc. No. 19.)

4 The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines this matter
5 is appropriate for resolution without oral argument and submits the matter on the papers. For
6 the reasons set forth below, the Court adopts the R&R, denying Respondents' motion to
7 dismiss based on failure to exhaust and denying Petitioner's motion without prejudice.

8 Background

9 On January 12, 2005, Petitioner was sentenced to a total term of eighty five years to life
10 for two counts of lewd and lascivious acts upon a minor child in violation of California Penal
11 Code 288(a), one count of indecent exposure in violation of California Penal Code 314(1), one
12 count of child annoyance with a previous felony conviction for lewd act upon a child in
13 violation of California Penal Code 647.6(c)(2), and two strikes prior. (Lodg. No. 4.) On May
14 30, 2006, Petitioner filed a petition for review in the California Supreme Court in which he
15 alleged numerous claims for ineffective assistance of trial counsel. (Lodg. No. 1.) On August
16 18, 2006, the California Supreme Court summarily denied the petition. (Lodg. No. 2.) On
17 August 1, 2007, Petitioner signed a state habeas petition, which was subsequently filed in San
18 Diego Superior Court on August 30, 2007. (Lodg. No. 3.) The Superior Court denied the
19 petition on October 29, 2007. (Id.) On January 22, 2008, Petitioner constructively filed a state
20 habeas petition in the California Court of Appeal, Fourth Appellate District, Division One.
21 (Lodg. No. 5.) The California Court of Appeal, Fourth Appellate District, Division One denied
22 the petition on May 8, 2008. (Lodg. No. 6.) On July 3, 2008, Petitioner constructively filed
23 a state habeas petition in the California Supreme Court. (Lodg. No. 9; Doc. No. 25, Ex. 2.)
24 On August 18, 2008, Petitioner constructively filed the current federal habeas petition. (Doc.
25 No. 1 at 36.) On January 7, 2009, Petitioner filed a second habeas petition in California
26 Supreme Court as case number S169564. (Doc. No. 29, Attach. 1.) Two weeks later, on
27 January 21, 2009, the California Supreme Court denied Petitioner's first petition, case number
28 S164972. (Doc. No. 25, Ex. 2.) On April 20, 2009, Petitioner filed a First Amended Petition

1 with the Court. (Doc. No. 28.) Petitioner alleged seven grounds for relief in his First Amended
2 Petition: (1) prosecutorial misconduct and ineffective assistance of counsel; (2) the trial court
3 violated his right to a fair trial by instructing the jury that uncharged crimes evidence need only
4 be proved by a preponderance of evidence; (3) there was insufficient evidence to support his
5 convictions for committing lewd act on a child; (4) the trial court should have imposed a
6 sentence akin to the one prescribed or continuous sexual abuse of a child; (5) the trial court
7 erred in imposing excessive consecutive terms; (6) his sentence constitutes cruel and unusual
8 punishment; and (7) the cumulative effect of the trial errors was prejudicial. (Doc. No. 28.)
9 On June 24, 2009, the California Supreme Court denied Petitioner’s second petition, case
10 number S169564. (Doc. No. 33, Ex. C.)

11 **Discussion**

12 **I. Scope of Review and Applicable Legal Standard**

13 A district court “may accept, reject, or modify, in whole or in part, the findings or
14 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). If a party objects
15 to any portion of a magistrate judge’s report, the district court “shall make a de novo
16 determination of those portions of the report . . . to which objection is made.” *Id.* The district
17 court must make a de novo review of all conclusions of law, even if no objection is made.
18 Avratin v. Bermudez, 420 F. Supp.2d 1121, 1122-23 (S.D. Cal. 2006) (citing Barilla v. Irvin,
19 886 F.2d 1514, 1518 (9th Cir. 1989), overruled on other grounds).

20 Congress amended the Anti-Terrorism and Effective Death Penalty Act of 1996
21 (“AEDPA”) 28 U.S.C. § 2254(d) to provide the following standard of review applicable to
22 state court decisions:

23 (d) An application for a writ of habeas corpus on behalf of a person in custody
24 pursuant to the judgment of a State court shall not be granted with respect to any
25 claim that was adjudicated on the merits in State court proceedings unless the
adjudication of the claim—

26 (1) resulted in a decision that was contrary to, or involved an
27 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

28 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the State

1 court proceeding.

2 28 U.S.C. § 2254(d).

3 AEDPA imposes a one-year statute of limitations on petitions for writ of habeas corpus
4 filed by state prisoners. 28 U.S.C. § 2244(d). The one-year limitations period runs from the
5 latest of:

6 (A) the date on which the judgment became final by the conclusion of direct
7 review or the expiration of the time for seeking such review;

8 (B) the date on which the impediment to filing an application created by State
9 action in violation of the Constitution or laws of the United States is removed,
10 if the applicant was prevented from filing by such State action;

11 (C) the date on which the Constitutional right asserted was initially recognized
12 by the Supreme Court, if the right has been newly recognized by the Supreme
13 Court and made retroactively applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or claims presented
15 could have been discovered through the exercise of due diligence.

16 28 U.S.C. § 2244(d)(1).

17 **II. Respondents' Motion to Dismiss**

18 Respondents moved to dismiss the petition on the basis that Petitioner has failed
19 to exhaust all of his claims. Prisoners in state custody who wish to challenge in federal
20 habeas proceedings either the fact or length of their confinement first are required to
21 exhaust state judicial remedies by presenting the highest state court available with a fair
22 opportunity to rule on the merits of every claim they seek to raise in federal court. See
23 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982). If available
24 state remedies have not been exhausted as to all claims, the district court must dismiss
25 the petition. Id. at 510; Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir.1988). A dismissal
26 solely for failure to exhaust is not a bar to returning to federal court after exhausting
27 available state remedies. See Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th
28 Cir.1995).

29 Respondents contend that Petitioner has not exhausted claims two through seven
30 because they are “currently pending in the California Supreme Court . . . and until [that
31 court] rules on . . . the petition, grounds two through seven are unexhausted.” (Doc.

1 No. 31.) See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (prior to
2 filing a habeas petition state prisoners must first exhaust state judicial remedies by
3 allowing the highest state court an opportunity to rule on the merits of every claim).
4 Respondents argue the petition should be dismissed without prejudice, or petitioner
5 should be afforded an opportunity to delete the unexhausted grounds and proceed on
6 the exhausted one. (Doc. No. 31.) In opposition, Petitioner asserts the California
7 Supreme Court ruled on the pending petition, and he submits a copy of the order. (Doc.
8 No. 33, Ex. C.) The California Supreme Court denied the petition on June 24, 2009,
9 only a few days after Respondent filed this Motion to Dismiss. (Doc. No. 33, Ex. C.)

10 After reviewing Petitioner's California Supreme Court petition, case number
11 S169564, the Court concludes that Petitioner has exhausted all of his federal claims by
12 presenting all his First Amended Petition claims to the California Supreme Court.
13 (Doc. No. 29, Attach. 1.) Accordingly, the Court denies Respondents' motion to
14 dismiss for failure to exhaust.

15 **III. Petitioner's Motion**

16 Petitioner alleges prison officials violated his constitutional rights by interfering
17 with the processing of his legal mail. (Doc. No. 35.) Petitioner's motion challenges
18 Petitioner's conditions of confinement and is properly brought in a civil rights
19 complaint under 42 U.S.C. § 1983. See Wilwording v. Swanson, 404 U.S. 249, 251
20 (1971) (per curiam), overruled on other grounds by Woodford v. Ngo, 548 U.S. 81
21 (2006). Although the Court has discretion to convert habeas petitions to prisoner civil
22 rights complaints, the circumstances are not appropriate for use of such discretionary
23 power. Id. at 251. Most of Petitioner's claims are appropriate for habeas review, and
24 he has not satisfied either the filing fee or exhaustion requirements for bringing a civil
25 rights complaint. See 28 U.S.C. §§ 1914(a) & 1915(b)(1) (filing fee of \$350 for civil
26 rights complaints or qualification to proceed *in forma pauperis*); 42 U.S.C. § 1997e
27 (civil rights complaints may not be made in federal court until all prison administrative
28 remedies are exhausted). Additionally, the Court notes that it denied Respondents'

1 motion to dismiss after concluding Petitioner has satisfied the exhaustion requirements
2 with regard to his habeas petition. Therefore, the Court denies without prejudice
3 Petitioner's motion concerning his mail.

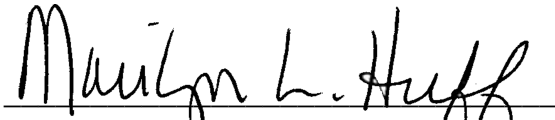
4 **Conclusion**

5 For the reasons set forth above, the Court ORDERS the following:

- 6 (1) The Court ADOPTS the Report and Recommendation.
7 (2) The Court DENIES Respondents' motion to dismiss.
8 (3) The Court DENIES WITHOUT PREJUDICE Petitioner's motion.

9 **IT IS SO ORDERED.**

10 DATED: January 25, 2010

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12 _____
13 MARILYN L. HUFF, District Judge
14 UNITED STATES DISTRICT COURT

15 COPIES TO:
16 All parties of record.
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