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

RAUL MACIAS GARCIA,

Petitioner,

vs.

JAMES A. YATES, Warden,

Respondent.

CASE NO. 08cv1993-LAB (WMc)
**ORDER ADOPTING REPORT
AND RECOMMENDATION;

ORDER DENYING MOTION TO
STAY; AND

ORDER GRANTING MOTION TO
DISMISS**

[Docket Nos. 6, 9]

Petitioner, a prisoner in state custody, brought a petition for writ of habeas corpus (the "Petition") in this Court, pursuant to 28 U.S.C. § 2254. Respondent moved to dismiss Petition, pointing out Petitioner had not exhausted all claims. Petitioner moved for a stay to permit him to exhaust remedies in state court before proceeding.

Pursuant to 18 U.S.C. § 636(b) and Civil Local Rule 72.1(c) and (d), these matters were referred to Magistrate Judge William McCurine for a report and recommendation. On April 10, 2009, Judge McCurine issued his report and recommendation (the "R&R"). The R&R recommended denying the motion to stay, and dismissing the Petition as mixed but permitting Petitioner to file an amended Petition bringing only exhausted claims. Petitioner filed objections (the "Objections").

1 A district court has jurisdiction to review a Magistrate Judge's report and
2 recommendation concerning a dispositive pretrial motion. Fed. R. Civ. P. 72(b). "The district
3 judge to whom the case is assigned shall make a de novo determination upon the record,
4 or after additional evidence, of any portion of the magistrate judge's disposition to which
5 specific written objection has been made in accordance with this rule." *Id.*; see also 28
6 U.S.C. § 636(b)(1)(C). "A judge of the court may accept, reject, or modify, in whole or in
7 part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §
8 636(b)(1)(C). Thus, this Court must review those parts of the report and recommendation
9 to which a party has filed a written objection.

10 Neither party objected to the R&R's statement of facts, which the Court therefore
11 **ADOPTS**, with modifications as set forth below. As the R&R explains, Petitioner now raises
12 two claims he did not present either on appeal or in state habeas proceedings. He argues
13 first that the state trial court failed to sentence him in accordance with California's sentencing
14 laws, and second that his trial was tainted by prosecutorial misconduct. The alleged
15 misconduct consisted of introducing false evidence and wrongly preventing a witness from
16 testifying in Petitioner's favor. (Pet. at 6.) In part, Petitioner's unexhausted claims attempt
17 to recast two exhausted evidentiary claims as prosecutorial misconduct claims. However,
18 a claim is only exhausted where the petitioner has presented the state's highest court with
19 the same factual basis and federal legal theories; mere similarity of claims is insufficient to
20 exhaust. *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996); *Duncan v. Henry*, 513 U.S. 364,
21 366 (1995); *Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003), *overruled on other grounds*
22 *by Robbins v. Carey*, 481 F.3d 1143, 1148–49 (9th Cir. 2007). Petitioner does not contest
23 the R&R's finding that he failed to exhaust these two claims in state court, but contends his
24 failure to exhaust before filing his federal Petition was caused by ineffective assistance of
25 counsel, which should not be attributed to him. The Petition is thus "mixed," meaning some
26 claims are exhausted and some are unexhausted.

27 The stay-and-abeyance procedure is an exercise of the Court's equitable powers.
28 *Pliier v. Ford*, 542 U.S. 225, 234 (2004) (O'Connor, J., concurring). The Court should

1 ordinarily exercise its discretion to stay a mixed petition where there is good cause for a
2 petitioner's failure to exhaust, the unexhausted claims are potentially meritorious, and the
3 petitioner engaged in no intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S.
4 269, 278 (2005). Petitioner is required to demonstrate that these conditions are met.
5 *Jackson v. Roe*, 425 F.3d 654, 662 (9th Cir. 2005) (citing *Akins v. Kenney*, 410 F.3d 451, 456
6 (8th Cir. 2005)). If the Court finds a stay inappropriate, it should afford Petitioner an
7 opportunity to amend his Petition to delete the unexhausted claims before dismissing the
8 action altogether. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

9 The R&R sets forth the procedural history up to the point Petitioner filed his Petition
10 in this Court. Petitioner was convicted on July 22, 2005. California's Court of Appeal
11 affirmed the judgment on August 24, 2007, and the California Supreme Court denied his
12 petition for review on November 28, 2007. Petitioner then filed his Petition in this Court on
13 October 27, 2008. On November 4, the court issued a notice informing Petitioner of the
14 possible failure to exhaust his claims, and AEDPA's one-year limitations period.

15 Petitioner then began attempting to exhaust the remaining two claims. Petitioner's
16 lodgment (Pet'r's Notice of Lodgment, Docket no. 10, referencing case number S169701)
17 attaches a petition he filed in the California Supreme Court, which in turn mentions a petition
18 he filed in the California Court of Appeal. (*Id.*, Docket no. 10-2 at 9 (referencing case
19 number D054200).) On August 19, 2009, Petitioner asked the Court to take judicial notice
20 of the order of the California Supreme Court dated June 17, 2009, denying his petition.
21 Pursuant to Fed. R. Evid. 201, Petitioner's request for notice of the order denying habeas
22 relief is **GRANTED**. The Court also *sua sponte* takes notice of the dockets in case numbers
23 D054200 and S169701 for the purpose of showing what Petitioner filed, when he filed it, and
24 what actions the state courts took. See Fed. R. Evid. 201(c); *United States v. Borneo, Inc.*,
25 971 F.2d 244, 248 (9th Cir. 1992).

26 The docket in case number D054200 shows Petitioner filed his petition in the Court
27 of Appeal on December 5, 2008, about a month after this Court warned him about
28 unexhausted claims. The state appellate court denied that petition by minute order on

1 December 24, 2008 because Petitioner had not presented it to the trial court. The docket
2 in case S169701 shows that about a month later, he filed his second petition with the state
3 supreme court, again bypassing the trial court. The state supreme court denied his petition,
4 citing *In re Swain*, 34 Cal.2d 300, 304 (1949) and *People v. Duvall*, 9 Cal.4th 464, 474
5 (1995) but otherwise providing no explanation. The R&R is hereby **MODIFIED** to include
6 these facts in the procedural history.

7 The Court cannot grant a stay when the unexhausted claims are “plainly meritless.”
8 *Rhines*, 544 U.S. at 270. Petitioner’s first claim, alleging the trial court did not sentence him
9 properly under state law, falls in this category. Purely state law claims are not cognizable
10 on federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). The R&R correctly
11 found Petitioner’s first claim did not identify an error so fundamentally unfair as to deny him
12 due process. (See R&R, 8:14–9:4.) The Objections do not address this point.

13 With regard to his second claim for prosecutorial misconduct, Petitioner argues his
14 counsel’s failure to raise these matters on appeal or in state habeas proceedings constitutes
15 good cause. In support of this, he cites *Hernandez v. Sullivan*, 397 F. Supp. 2d 1205
16 (C.D.Cal. 2005) and *Harris v. Kuhlman*, 601 F. Supp. 987 (E.D.N.Y. 1985). The R&R found
17 both cases distinguishable, pointing out he provided no evidence or details of the alleged
18 ineffective assistance of counsel other than merely stating his counsel failed to present his
19 claims. The Objections do not respond to this.

20 As part of his lodgments, Petitioner included a letter from his appellate counsel, dated
21 October 7, 2008, explaining the reasoning behind the decision not to raise these claims.
22 (Pet’r’s Notice of Lodgment, Docket no. 10-2, at 8.) The letter reminds Petitioner they
23 discussed the issue before the first appellate brief was filed. (*Id.*) The letter recounts
24 several reasons why the issue of allegedly false testimony was not raised on appeal, and
25 concludes that even if there were any reason to think the prosecutor had knowingly offered
26 false testimony, the evidence formed an insignificant part of the case against Petitioner and
27 would not have led the appellate court to reverse the conviction. (*Id.*) This letter strongly
28 suggests insofar as Petitioner’s claim is based on allegations the prosecutor knowingly

1 offered false testimony, it would fail, because it shows Petitioner's own counsel reviewed the
2 record and could not conclude the prosecutor knowingly did so.

3 With regard to Petitioner's allegation that the prosecutor prevented a witness from
4 testifying truthfully, Petitioner's brief on direct appeal address the details of this, citing the
5 record. (Resp.'s Lodgment 2 at 3–4.) The Court of Appeal's decision confirms these details.
6 (Resp.'s Lodgment 3 at 3.) The discussion on appeal shows what Petitioner has described
7 as prosecutorial misconduct is actually a claim that the jury should not have believed the
8 government's witnesses, one of whom was a prosecutor, when they testified that Petitioner
9 attempted to get his accomplice to falsely confess and take full responsibility for the crimes
10 Petitioner was charged with. The appellate record also shows the witness refused to
11 incriminate himself after consulting with his own attorney.

12 In short, the pleadings, taken as a whole, provide no information to show his
13 unexhausted claims are potentially meritorious. Rather, the record strongly suggests these
14 claims are based on misapprehension of the factual record and untenable legal theories.

15 As to the question of whether Petitioner has now exhausted his state remedies, the
16 state supreme court's citation of *Swain* indicates either Petitioner failed to make allegations
17 with sufficient particularity, or that he failed to explain his delay in raising the issues. *White*
18 *v. Ollison*, 592 F. Supp. 2d 1227, 1231 n.2 (C.D.Cal. 2008). The citation to *Duvall* indicates
19 he failed to state with particularity the facts on which he sought relief, or that he failed to
20 include documentary evidence. *Id.* at 1231 n.3. In other words, Petitioner did not provide
21 enough information to show why he was entitled to relief.

22 A denial based on *Swain* and *Duvall* may, but does not always, establish that a
23 petitioner's claims are unexhausted. When a petitioner contends he has presented his
24 claims to the California Supreme Court with as much particularity as possible, this Court
25 must independently review the state petition to determine whether the claims were fairly
26 presented. *Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986). A claim is fairly
27 presented, and thus exhausted, when the petitioner has given the state court a fair
28 opportunity to act on his claims by setting forth in his petition the operative facts and the

1 federal legal theory on which the claim is based. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th
2 Cir. 2008).

3 Here, Petitioner has not argued he presented his claims with as much particularity as
4 possible. Even if he had, the petition shows Petitioner did not adequately present his
5 prosecutorial misconduct claim. The only attempt to describe the federal legal theory on
6 which this claim is based is a bare citation to *Shih Wei Su v. Fillion*, 335 F.3d 119 (2d Cir.
7 2003) (cited in Pet'r's Notice of Lodgment, Docket no. 10-2, at 6), which held that a
8 prosecutor's knowing presentation of false testimony required reversal, unless the error was
9 harmless. In his petition, the only allegation the prosecutor knowingly offered false testimony
10 states "The Prosecutor induced the alleged victim, Weinert, to commit perjury and invoke his
11 5th Amendment right to not confess, that caused Petitioner to be convicted of the robbery the
12 alleged victim, Weinert, committed." (Pet'r's Notice of Lodgment, Docket no. 10-2, at 6.)
13 The petition then cites to two pages of the trial transcript, which is not attached to the
14 petition. The Court therefore concludes even now Petitioner has not exhausted his claims.

15 Timeliness would be an adequate reason for denying the state petition, because
16 Petitioner knew as early as December, 2006 that his counsel considered the two claims
17 unmeritorious and would not raise them on direct appeal (see Pet'r's Notice of Lodgment,
18 Docket no. 10-2, at 10 (letter from Petitioner's counsel)), and yet Petitioner waited two years
19 to file it. See *In re Harris*, 5 Cal.4th 813, 828 (1993) (explaining that a habeas petition would
20 ordinarily be considered timely when filed within 90 days of the final due date for the filing
21 of an appellant's reply brief). Petitioner is proceeding *in pro per* in his state habeas
22 proceeding, so the state supreme court's denial of his petition for failure to provide adequate
23 information, and possibly for failure to timely file, the default is attributable to him. The only
24 reason he provides in his petition to the state supreme court was that he "is a greenhorn at
25 law." (Pet'r's Notice of Lodgment, Docket No. 10-2, at 9.) In any event, Petitioner's delay in
26 raising his claims supports a finding he was dilatory without excuse.

27 Because Petitioner was dilatory and because there is no evidence his unexhausted
28 claims are meritorious, Petitioner does not meet the standard set forth in *Rhines*, 544 U.S.

1 at 278. Furthermore, the prosecutorial misconduct claims are largely reformulations of
2 Petitioner's exhausted claims, albeit with additional allegations of corrupt prosecutorial
3 involvement. If Petitioner's exhausted claims succeed, he will not need to rely on the
4 unexhausted claims. If his exhausted claims fail, it is unclear how his unexhausted claims
5 could succeed.

6 The Court therefore **OVERRULES** Petitioner's Objections to the R&R and **ADOPTS**
7 the R&R as modified herein.

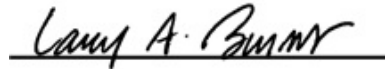
8 For these reasons, Petitioner's motion to stay is **DENIED**. Respondent's motion to
9 dismiss for failure to exhaust all claims presented is **GRANTED**. No later than **30 calendar**
10 **days from the date this order is entered**, Petitioner may file an amended petition
11 containing only his exhausted claims. Petitioner is cautioned that failure to file an amended
12 petition within the time permitted may waive any claims he wishes to raise in his habeas
13 petition.

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15 **IT IS SO ORDERED.**

16 DATED: August 25, 2009

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HONORABLE LARRY ALAN BURNS
United States District Judge

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