

1 current dating relationship (Cal. Pen. Code § 243(e)(1)). Lodgment 13 at 62-64. He is serving a nine
2 year sentence in Respondent's custody. Lodgment 13 at 123-126.

3 Petitioner filed a direct appeal of the conviction. In the appeal he claimed: (1) Cal. Pen. Code §
4 136.1(c)(3) is a sentencing enhancement and not a separate crime; (2) insufficient evidence supported
5 his conviction for battery against a significant other; and (3) ineffective assistance of counsel for not
6 moving for a judgment of acquittal on the domestic battery charge. Lodgment 1.

7 Next, Petitioner filed a habeas petition with the court of appeal, where he claimed: (1) ineffective
8 assistance of counsel under the state and federal constitutions due to counsel's failure to recognize
9 Petitioner's prior conviction was a sentencing factor and not an element of the substantive offense under
10 Cal. Pen. Code § 136.1; and (2) ineffective assistance of counsel under the federal constitution due to
11 counsel eliciting inculpatory evidence and failing to move for an acquittal on the domestic battery
12 charge. Lodgment 4. The court of appeal consolidated the state habeas petition with the direct appeal.
13 Lodgment 5. The appellate court affirmed in part and reversed in part the judgment and denied the
14 petition. Lodgment 6. It then denied the petition for rehearing. Lodgment 9.

15 Petitioner filed a petition for review with the California Supreme Court. He claimed (1)
16 ineffective assistance of counsel under the state and federal constitutions due to counsel's failure to
17 recognize Petitioner's prior conviction was a sentencing factor and not an element of the substantive
18 offense under Cal. Pen. Code § 136.1; (2) Cal. Pen. Code § 136.1 is a greater offense only in the sense
19 that all the elements necessary for punishment cannot be true unless all elements of 136.1 (a) or 136.1(b)
20 have been found true, and the factors of 136.1(c) are sentencing factors and not elements; and (3) the
21 court should determine the conflict regarding whether a subdivision within a statute that serves to
22 increase punishment based on recidivism of the same offense is a sentencing provision or an element of
23 a separate offense. Lodgments 10, 11. The California Supreme Court summarily denied the petition for
24 review. Lodgment 12.

25 Petitioner was represented by counsel for all the filings he submitted to the state courts.

26 **2. Federal Habeas Petition.**

27 In support of this Petition, Petitioner filed the same memorandum of points and authorities that
28 he filed as part of his habeas petition to the state court of appeal. Here, Petitioner claims: (1) ineffective

1 assistance of counsel under the state and federal constitutions due to counsel's failure to recognize
2 Petitioner's prior conviction was a sentencing factor and not an element of the substantive offense under
3 Cal. Pen. Code § 136.1; and (2) ineffective assistance of counsel under the federal constitution due to
4 counsel eliciting inculpatory evidence and failing to move for an acquittal as to the domestic battery
5 charge. [Doc. No. 1.]

6 The court sent Petitioner a "Notice Regarding Possible Failure to Exhaust and One-Year Statute
7 of Limitations." [Doc. No. 4.] The court informed Petitioner of his options should his Petition contain
8 unexhausted claims.

9 DISCUSSION

10 **1. Request to Dismiss Part of Claim 1.**

11 Respondent moves to dismiss the first ground of claim 1 because it fails to state a federal
12 question. In support of Claim 1, Petitioner cites to the memorandum of points and authorities filed in
13 support of his state habeas petition. Heading I of that memorandum, which states Petitioner's first
14 claim, reads:

15 The fact of a prior conviction serves to increase punishment, and, hence, is
16 a sentencing provision rather than a substantive element of any Penal
17 Code section 136.1 offense. Trial counsel's failure to recognize the
distinction and make appropriate motions was ineffective assistance of
counsel and prejudicial.

18 Pet'n, Mem. Ps&As, p.6. Heading I contains two subsections, A. "Section 136.1," and B. "Ineffective
19 Assistance of Counsel." In subsection A, Petitioner offers his explanation of Penal Code section 136.1.
20 *Id.*, pp.6-9. He does not state any claim for relief at the end of subsection A. In subsection B, Petitioner
21 argues that his trial counsel's failure to properly understand section 136.1 and the tactical decisions
22 based on that misunderstanding led to the ineffective assistance of counsel. *Id.*, pp. 9-15. At the end of
23 subsection B, Petitioner states, "For all of the foregoing reasons, trial counsel was ineffective, petitioner
24 has established a prima facie case, and an order to show cause should issue." *Id.*, p.15.

25 Respondent moves to dismiss the first section of Claim 1 because it does not present a federal
26 constitutional claim. Respondent interprets Claim 1 in this Petition to actually be two claims for relief.
27 Respondent believes that in the first ground of Claim 1 "Petitioner argues that the fact of a prior
28 conviction serves to increase punishment, and is therefore a sentencing provision rather than a

1 substantive element of a California Penal Code section 136.1 offense.” Mot. to Dismiss, p.6.
2 Consequently, Respondent argues that resolution of Claim 1 “involves the interpretation of California
3 statutes and does not present a federal constitutional claim.” *Id.* Respondent then contends that in the
4 second ground for Claim 1, Petitioner states a claim for ineffective assistance of trial counsel.

5 This court does not view Claim 1 in the Petition as alleging two separate grounds for relief.
6 Instead, this court finds that in Claim 1, Petitioner states a single claim for ineffective assistance of
7 counsel based on trial counsel’s alleged failure to recognize that the prior offense served as a sentencing
8 provision rather than a substantive element of any Penal Code section 136.1 offense. The alleged
9 mischaracterization of the prior conviction serves as a factual backdrop to Petitioner’s ineffective
10 assistance of counsel claim, not as a separate claim on its own. While Petitioner did seek relief
11 regarding Pen. Code § 136.1 in state court filings, he does not seek that relief here. Therefore, because
12 this court finds that Petitioner states a single claim for ineffective assistance of counsel in Claim 1 of the
13 Petition, the Court **RECOMMENDS** that the district judge **DENY** Petitioner’s motion to dismiss the
14 purported first ground of Claim 1 in the Petition.

15 **2. Exhaustion of Claim 2.**

16 Before filing a federal habeas petition, a prisoner in state custody pursuant to a state court
17 judgment must first exhaust state judicial remedies through either a direct appeal or collateral
18 proceedings. *See* 28 U.S.C. § 2254(b),(c). The prisoner must provide the highest state court available
19 with a fair opportunity to rule on the merits of each and every issue he or she seeks to raise in federal
20 court. *See Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). The petitioner has the burden of pleading
21 exhaustion in the habeas petition. *See Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981)
22 (citations omitted).

23 **A. The Claim Was Not Properly Presented to the Highest State Court.**

24 To fairly present the legal basis of the claim, a petitioner must alert the state courts that he is
25 asserting a federal claim. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam); *Lyons v.*
26 *Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), as modified by 247 F.3d 904 (9th Cir. 2001). In this
27 circuit, a petitioner must make the federal basis of the claim explicit either by referencing specific
28 provisions of the federal constitution or statutes, or citing to federal case law. *See Lyons*, 232 F.3d at

1 668, 670. Mere similarity of claims between a state law claim and a federal law claim is insufficient for
2 exhaustion purposes. *See Henry*, 513 U.S. at 366; *see also Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir.
3 1996) (rejecting former Ninth Circuit standard that allowed petitioner to exhaust federal claim by raising
4 essentially the same claim in state court). The required level of explicitness is the same for pro se
5 petitioners and petitioners represented by counsel. *See Lyons*, 232 F.3d at 667.

6 If a petitioner files a mixed habeas petition, a court must dismiss the entire petition without
7 reaching the merits of any of its claims. *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Guizar v. Estelle*, 843
8 F.2d 371, 372 (9th Cir. 1988). Dismissal is to be with leave to amend to delete the unexhausted claims;
9 if they are deleted, the court can then consider the remaining claims. *Rose*, 455 U.S. at 520; *see Anthony*
10 *v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000). In addition, a court may: (1) deny the petition even if it
11 is partly or entirely unexhausted if it fails to raise even a colorable federal claim; or (2) stay a mixed
12 petition to allow the petitioner to return to state court to exhaust the unexhausted issue or issues. 28
13 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 277-278 (2005). Because a stay and abeyance has
14 the potential to frustrate AEDPA’s dual purposes of encouraging finality of state court judgments and
15 creating incentives for petitioners to seek relief in state court first, the Supreme Court also stated that the
16 “stay and abeyance should be available only in limited circumstances.” *Id.* at 275-276.

17 Here, Petitioner presented Claim 2 from this Petition--for ineffective assistance of counsel
18 regarding the domestic battery charge--to the California court of appeal in his state habeas petition.
19 Lodgment 4. After the appellate court denied that petition, Petitioner filed--through his attorney--a
20 petition for review with the California Supreme Court. In the three claims presented to the California
21 Supreme Court, Petitioner did not claim ineffective assistance of counsel as to the battery count. *See*
22 Lodgments 10, 11. Therefore, Petitioner has not presented Claim 2 from the Petition to the highest state
23 court available. Consequently, Respondent argues that the Court should dismiss the Petition as a mixed
24 petition containing both exhausted and unexhausted claims.

25 **B. Claim 2 Is Technically Exhausted.**

26 In opposition to this motion, Petitioner filed a “Petitioner Request for Opportunity to Abandon
27 His Sole Unexhausted Claim as Alternative to Dismissal of His Habeas Petition Equitably Tolloed Period
28 for Filing Second Federal Habeas Petition.” [Doc. No. 10.] In the pleading Petitioner requests “a stay of

1 the current proceedings in order to allow Petitioner to exhaust this claim.” Respondent argues the court
2 should not stay the Petition because the court had already informed Petitioner that he needed to fulfill
3 the exhaustion requirement and present each claim to the California Supreme Court, and Petitioner
4 failed to do so. Respondent further argues that Petitioner has an available judicial remedy because he
5 can bring an original habeas petition in the California Supreme Court.

6 A federal court may inquire into whether state remedies remain available for claims presented in
7 a federal habeas petition. *See Harris v. Reed*, 489 U.S. 255, 268-271 (1989) (O’Connor, J., concurring)
8 (stating district courts have an obligation to determine if state court remedies remain available). The
9 exhaustion requirement may be satisfied notwithstanding a failure to present a claim to the state
10 supreme court, “if it is clear that (the habeas petitioner’s) claims are now procedurally barred under
11 (state) law.” *Gray v. Netherland*, 518 U.S. 152, 16-62 (1996), quoting *Castille v. Peoples*, 489 U.S.
12 346, 351 (1989); *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982) (noting that the exhaustion
13 requirement applies “only to remedies still available at the time of the federal petition.”); *Valerio v.*
14 *Crawford*, 306 F.3d 742, 770 (9th Cir. 2002) (a procedurally barred claim satisfies exhaustion
15 requirement), citing *Phillips v. Woodford*, 267 F.3d 966, 974 (9th Cir. 2001) (“the district court correctly
16 concluded that [the] claims were nonetheless exhausted because ‘a return to state court for exhaustion
17 would be futile.’”).

18 “A habeas petitioner who has defaulted his federal claims in state court meets the *technical*
19 requirements for exhaustion; there are no state remedies any longer ‘available’ to him.” *Cassett v.*
20 *Stewart*, 406 F.3d 614, 621 n.5 (9th Cir. 2005), quoting *Coleman v. Thompson*, 501 U.S. 722, 732
21 (1991); *see* 28 U.S.C.A. § 2254(c) (“An applicant shall not be deemed to have exhausted the remedies
22 available in the courts of the State, within the meaning of this section, if he has the right under the law
23 of the State to raise, by any available procedure, the question presented.”)

24 The California state courts will not consider either successive petitions or delayed petitions
25 without a showing of good cause: “Before considering the merits of a second or successive petition, a
26 California court will first ask whether the failure to present the claims underlying the new petition in a
27 prior petition has been adequately explained, and whether that explanation justifies the piecemeal
28 presentation of the petitioner's claims.” *In re Clark*, 5 Cal.4th 750, 774, rehearing denied (1993). “With

1 the exception of petitions which allege facts demonstrating that a fundamental miscarriage of justice has
2 occurred . . . unjustified successive petitions will not be entertained on their merits. *Id.* Similarly, an
3 unexplained delay in filing a habeas petition would require the state court to reject the petition. *See e.g.*
4 *People v. Amsbary*, 51 Cal.App.3d 75, 79 (1975) (“a petition for habeas corpus must be rejected where
5 there is an unreasonable unexplained delay in filing it.”); *Evans v. Chavis*, 546 U.S. 189, 199-200 (time
6 periods of 30 to 60 days between filings is reasonable); *Culver v. Director of Corrections*, 450 F.
7 Supp.2d 1137, 1140-41 (C.D. Cal 2006) (finding unexplained and unjustified delays of 71 and 97 days
8 unreasonable under California law).

9 Here, Petitioner, through counsel, filed a direct appeal and a habeas petition with the state court
10 of appeal. Petitioner raised Claim 2 from this Petition in his state habeas petition. The court of appeal
11 consolidated the direct appeal with the habeas petition, and denied the petition. Then, through counsel
12 again, Petitioner filed a petition for review with the California Supreme Court. In that petition he
13 included Claim 1 but abandoned Claim 2. The California Supreme Court denied the petition for review
14 on January 16, 2008. If Petitioner were to now bring a new petition to the state supreme court, the delay
15 would be at least eighteen months. Applying California law, the state courts would find this delay
16 unreasonable and would reject the petition on procedural grounds.¹

17 Respondent argues that the state court should be given an opportunity to determine whether the
18 claim should be addressed on the merits or whether it should be procedurally barred. But given
19 Petitioner’s abandonment of Claim 2 at the California Supreme Court, and the minimum eighteen month
20 delay before he could attempt to even file a new habeas petition with that court, Claim 2 would be
21 procedurally barred. This court concludes that Petitioner no longer has an available remedy regarding
22 Claim 2 in state court. Claim 2 is technically exhausted, as a return to state court would be futile.
23 Because the claim is technically exhausted, the Petition is not mixed and dismissal of the entire Petition
24 is unwarranted. Accordingly, this court **RECOMMENDS** that the motion to dismiss based on grounds
25 that this is a mixed petition be **DENIED**. This denial should be without prejudice to Respondent raising

26
27 ¹To proceed on a procedurally defaulted claim, a petitioner must show good cause for his failure
28 to properly present his claim to the state supreme court, and prejudice as a result of this court’s
imposition of a procedural default, or show that a fundamental miscarriage of justice would result if
habeas relief was denied as a result of the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

1 the defense of procedural default as to Claim 2.

2 **CONCLUSION**


3 For all of the above reasons, this Court **RECOMMENDS** that Respondent's motion to dismiss
4 the Petition be **DENIED**, that Petitioner's request to stay be **DENIED**, and that Respondent be
5 **ORDERED** to file an answer to the Petition.

6 This Report & Recommendation is submitted to the United States District Judge assigned to this
7 case pursuant to 28 U.S.C. § 636(b)(1).

8 **IT IS ORDERED** that no later than **June 22, 2009**, any party to this action may file written
9 objections with the Court and serve a copy on all parties. The document should be captioned
10 "Objections to Report and Recommendation." The parties are advised that failure to file objections
11 within the specified time may waive the right to raise those objections on appeal of the Court's order.
12 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and
14 served on all parties no later than **July 6, 2009**. The parties are advised that failure to file objections with
15 the specified time may waive the right to raise those objections on appeal of the Court's order. *Martinez*
16 *v. Ylst*, 951 F2d 1153 (9th Cir. 1991).

17 DATED: June 10, 2009

18 
19 Hon. Nita L. Stormes
20 U.S. Magistrate Judge