



1 schedule requiring Respondent to file a motion to dismiss by March 20, 2017, and Petitioner to  
2 file an opposition by April 19, 2017. ECF No. 7. Respondent filed a motion to dismiss on March  
3 17, 2017. ECF No. 10-1 ("MTD"). After the Court granted Petitioner an extension of time to file  
4 his opposition to Respondent's motion to dismiss, Petitioner timely filed his opposition Nunc Pro  
5 Tunc on June 2, 2017. ECF No. 15 ("Oppo."); see ECF Nos. 12, 13. Currently before the Court  
6 is Respondent's Motion to Dismiss for lack of exhaustion [MTD] and Petitioner's opposition  
7 [Oppo.]. For the reasons set forth below, the Court **RECOMMENDS** that Respondent's motion  
8 to dismiss be **GRANTED**.

### 9 **FACTUAL AND PROCEDURAL BACKGROUND**

10 On October 31, 2014, a jury convicted Petitioner of attempted burglary in the first degree.  
11 See Lodgment 4 at 170; Lodgment 1-3 at 240. The trial court found true that Petitioner had  
12 two prison priors, two serious felony priors, and four prior strike convictions. Lodgment 4 at  
13 174. On January 16, 2015, Petitioner was sentenced to twenty-five years to life, plus ten years.  
14 See id. at 4 at 170; Lodgment 1-3 at 260-61.

15 On January 23, 2015, Petitioner filed a notice of appeal to the California Court of Appeal.  
16 Lodgment No. 4 at 186. Petitioner alleged: (1) there was insufficient evidence to support his  
17 attempted burglary conviction, (2) the trial court erred in admitting evidence of Petitioner's two  
18 prior burglary convictions because he conceded intent, and (3) the abstract of judgment must  
19 be corrected to accurately reflect the Court's order at sentencing regarding custody credits.  
20 Lodgment No. 5 at 6, 12, 23. On March 29, 2016, the Court of Appeal for the Fourth Appellate  
21 District, Division One, affirmed the judgment and ordered the court clerk to correct the trial  
22 court's abstract of judgment to show an award of 274 days of actual credits. Lodgment No. 8  
23 at 18.

24 On May 2, 2016, Petitioner filed a Petition for Review in the California Supreme Court,  
25 contending that: (1) there was insufficient evidence to support his attempted burglary  
26 conviction, and (2) the trial court erred in admitting evidence of Petitioner's two prior burglary  
27 convictions because he conceded intent. Lodgment No. 9 at 2, 5; see also Lodgment No. 10.  
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1 On June 8, 2016, the California Supreme Court summarily denied the petition without comment  
2 or citation to authority. Lodgment No. 10. Petitioner did not file a petition for certiorari in the  
3 United States Supreme Court and did not file state habeas corpus petitions in any California  
4 state court. Pet. at 3-5.

5 On October 30, 2016, Petitioner constructively filed a federal habeas petition in this Court.  
6 Id. He raises four claims in the instant petition: (1) the trial court violated his right to jury trial  
7 by imposing an upper term sentence based on facts that were not found by the jury, (2) the  
8 use of Petitioner's prior plea agreements as prior strike convictions violated the terms set forth  
9 in those plea agreements, constituting a breach of contract, (3) the trial court committed  
10 constitutional error by imposing a sentence that exceeded the maximum sentence based on the  
11 jury verdict facts, and (4) the trial court's sentence violated Petitioner's plea agreements for  
12 prior offenses. Id. at 6-25.

### 13 **SCOPE OF REVIEW**

14 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
15 federal habeas corpus claims:

16 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall  
17 entertain an application for a writ of habeas corpus in behalf of a person in custody  
18 pursuant to the judgment of a State court only on the ground that he is in custody  
19 in violation of the Constitution or laws or treaties of the United States.

20 28 U.S.C. § 2254(a) (2006 & Supp. 2016).

### 21 **DISCUSSION**

22 Respondent contends that the Petition should be dismissed because all the claims are  
23 unexhausted. MTD at 4. Petitioner states that his claims are exhausted and argues at length  
24 about a multitude of errors committed during the state court proceedings. Oppo. at 4, 4-12.

25 A federal court may not consider a petition for habeas corpus unless the petitioner has  
26 first presented his claims to the state courts, thereby "exhausting" them. 28 U.S.C.  
27 §2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 522 (1982). The exhaustion requirement is  
28 founded on federal-state comity, as only when the state court has been presented with the claim

1 may it “pass upon and correct alleged violations of its prisoners’ federal rights.” Duncan v.  
2 Henry, 513 U.S. 364, 365 (1995) (per curiam) (quotation marks and citations omitted). Thus,  
3 exhaustion of a habeas petitioner’s federal claims requires that they have been “fairly  
4 present[ed]” in each appropriate state court, including a state supreme court with powers of  
5 discretionary review. Baldwin v. Reese, 541 U.S. 27, 29 (2004). In California, this generally  
6 entails direct or collateral presentation to both the lower courts of appeal and the state supreme  
7 court, though presentation to the state supreme court alone may suffice. Reiger v. Christensen,  
8 789 F.2d 1425, 1427 (9th Cir. 1986); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Claims  
9 are not exhausted by mere presentation to the state appellate system. A petitioner must also  
10 “alert [] [the state] court to the federal nature of the claim.” Baldwin, 541 U.S. at 29. A  
11 petitioner may indicate a federal claim by citing the source of federal law upon which he relies,  
12 or by merely labeling the claim as “federal.” Id. at 32. Where none of a petitioner’s claims have  
13 been presented to the highest state court as required by the exhaustion doctrine, the Court  
14 must dismiss the petition. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rasberry v. Garcia,  
15 448 F.3d 1150, 1154 (9th Cir. 2006).

16 Petitioner appealed his conviction to both the California Court of Appeal and California  
17 Supreme Court. See Docket; see also Lodgments 5, 9. As previously discussed, Petitioner raised  
18 the following two claims before the California Court of Appeal and the California Supreme Court:  
19 (1) there was insufficient evidence to support his attempted burglary conviction, and (2) the  
20 trial court erred in admitting evidence of Petitioner’s two prior burglary convictions because he  
21 conceded intent. Lodgment No. 5 at 6, 12; Lodgment No. 9 at 2, 5. Petitioner raised one  
22 additional claim before the California Court of Appeal: the abstract of judgment must be  
23 corrected to accurately reflect the Court’s order at sentencing regarding custody credits.  
24 Lodgment No. 5 at 23. Petitioner did not file a petition for writ of habeas corpus before the  
25 California Supreme Court (or any other state court) so the only exhausted claims are the two  
26 presented during the direct appeal.

27 The instant Petition raises the following claims: (1) the trial court violated his right to a  
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1 jury trial by imposing an upper term sentence based on facts that were not found by the jury,  
2 (2) the use of Petitioner’s prior plea agreements as prior strike convictions violated the terms  
3 set forth in those plea agreements, constituting a breach of contract, (3) the trial court  
4 committed constitutional error by imposing a sentence that exceeded the maximum sentence  
5 based on the jury verdict facts, and (4) the trial court’s sentence violated Petitioner’s plea  
6 agreements for prior offenses. Id. at 6-25. Because none of these claims were presented to  
7 the California Supreme Court as required by the exhaustion doctrine, they are not exhausted  
8 and this Court must dismiss the complaint.<sup>1</sup> See Rose v. Lundy, 455 U.S. at 521-22; Calderon  
9 v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc).

10 Accordingly, the Court **RECOMMENDS** that Respondent’s motion be **GRANTED** on the  
11 ground that the entire Petition is unexhausted and that the Petition for Writ of Habeas Corpus  
12 be **DISMISSED** without prejudice. Petitioner must present his claims to the California Supreme  
13 Court before filing a Petition for Writ of Habeas Corpus in this Court.

14 **CONCLUSION AND RECOMMENDATION**

15 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Judge issue  
16 an order: (1) approving and adopting this Report and Recommendation, (2) finding that the  
17 entire Petition is unexhausted, and (3) directing that Judgment be entered **GRANTING**  
18 Respondent’s Motion to Dismiss without prejudice.

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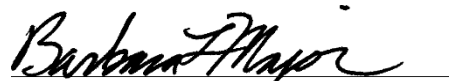
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21 <sup>1</sup> Respondent raises the question of the timeliness of any subsequent petition for writ of habeas  
22 corpus filed by Petitioner and the possibility of procedural default. MTD at 6. Timeliness and  
23 procedural default issues have not been properly presented to this Court and the Court finds it  
24 inappropriate to address them at this time. Moreover, the Court notes that Petitioner’s conviction  
25 did not become final until September 6, 2016 (90 days after the California Supreme Court denied  
26 his petition for direct review) so a California state court, which does not use a fixed statutory  
27 filing deadline but rather employs a reasonableness standard, may find a petition for writ of  
28 habeas corpus timely. See Walker v. Martin, 562 U.S. 307, 310 (2011); Carey v. Saffold, 536  
U.S. 214, 222 (2002); see also Curiel v. Miller, 830 F.3d 864, 879 n.5 (9th Cir. July 25, 2016)  
(Bybee, J. concurring) (opining that the petitioner’s state habeas petition, filed six years later,  
might be timely “because who knows what California’s ‘within a “reasonable time”” standard for  
timely filing means? We sure don’t.”) (citations omitted).

1           **IT IS ORDERED** that no later than **August 11, 2017**, any party to this action may file  
2 written objections with the Court and serve a copy on all parties. The document should be  
3 captioned "Objections to Report and Recommendation."

4           **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court  
5 and served on all parties no later than **September 1, 2017**. The parties are advised that  
6 failure to file objections within the specified time may waive the right to raise those objections  
7 on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

8           **IT IS SO ORDERED.**

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10 Dated: 7/10/2017

  
11 Hon. Barbara L. Major  
12 United States Magistrate Judge  
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