

1 On September 27, 2017, Petitioner filed an opposition¹ expressly disclaiming the
2 additional claims cited by Respondent, and affirming that he has alleged only two claims,
3 which he submits are exhausted. ECF No. 16.

4 The Court has reviewed the record, and for the following reasons,
5 **RECOMMENDS** that the district judge **DENY** the motion to dismiss and **ORDER**
6 Respondent to file an answer to the merits of the FAP.

7 **I. PROCEDURAL BACKGROUND**

8 On March 17, 2015, a jury found Petitioner guilty of thirteen counts of grand theft
9 and two counts of securities fraud. Lodgment 2 at 1; Lodgment 3 at 2. The jury also
10 found true certain special allegations and enhancements. Lodgment 2 at 1. On May 29,
11 2015, the trial court sentenced Petitioner to nine years and four months in state prison.
12 Lodgment 2 at 2; Lodgment 3 at 3-4.

13 Petitioner appealed his conviction to the California Court of Appeal arguing that
14 (1) the prosecution’s prejudicial delays both in investigating and bringing his case to trial
15 violated his state and federal constitutional rights to due process and a speedy trial and
16 (2) the statute of limitations barred ten of the counts against him. Lodgment 1. By order
17 dated August 22, 2016, the Court of Appeal affirmed the judgment. Lodgment 2.

18 On September 21, 2016, Petitioner filed, with the assistance of counsel, a Petition
19 for Review to Exhaust State Remedies in the California Supreme Court. Lodgment 3.
20 Therein, Petitioner again argued that the prosecution’s prejudicial delays in investigating
21 and bringing his case to trial violated his rights to due process and a speedy trial under
22 the California Constitution as well as the Sixth and Fourteenth Amendments of the U.S.
23 Constitution (citing Klopper v. North Carolina, 386 U.S. 213, 224-25 (1967) and Barker
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26 ¹ Petitioner entitles his opposition “Traverse and Motion to Dismiss, Reply to Response
27 and Points of Authority,” but given the nature of the pleading and the date of the filing,
28 the Court construes it as an opposition brief. Notably, a subheading is entitled “Motion
in Support of Traverse and Opposition [to] the Respondent’s ‘Motion to Dismiss Petition
for Writ of Habeas Corpus.’” ECF No. 16.

1 v. Wingo, 407 U.S. 514, 530-33 (1972)).² Id. Petitioner also raised the statute of
2 limitations claim, which is not alleged in his federal petition. Id. On October 26, 2016,
3 the California Supreme Court summarily denied review without citation to authority.
4 Lodgment 4. Petitioner has not filed any state habeas petitions. ECF No. 10 at 3-4.

5 On January 1, 2017, Petitioner filed a federal petition for writ of habeas corpus.
6 ECF No. 1. In his initial petition, Petitioner listed under “Ground one:” “See Attachment
7 II – Violation of United States Constitution – 6th and 14th amendment, right to due
8 process and fairness.” ECF No. 1 at 5. Under “Supporting facts:” he wrote “See
9 Attachment II – violation of Speedy Trial, Destruction of evidence, Selective prosecution
10 and Obstruction of Justice.” Id. Attachment II contained separate headers for each of the
11 four issues listed above, under which he provided argument and supporting case law. Id.
12 at 10-17.³ Following initial screening, the petition was dismissed because it was not clear
13 Petitioner had exhausted all of his claims. ECF No. 9. Specifically, the Court noted:

14 Petitioner states that he raised “federal and state due process and fairness”
15 claims and statute of limitations claims in state court. In the body of his
16 Petition, however, he raises speedy trial, destruction of evidence, selective
17 prosecution, and obstruction of justice claims. Thus, it is not clear whether
18 Petitioner has exhausted his claims.

18 Id. at 2.

19 On March 20, 2017, Petitioner filed his FAP. ECF No. 10. Under “Ground One”
20 he wrote “Federal Constitutional right to Speedy Trial including where there has been a
21 substantial and/or prejudicial delay prior to accusatory pleading.” ECF No. 10 at 6.
22 Petitioner then wrote “See Attached #II” under supporting facts. Id. For “Ground Two”
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25 ² In Barker, the Supreme Court stated: “[t]he Court’s opinion in Kloper v. North
26 Carolina, 386 U.S. 213 (1967), established that the right to a speedy trial is ‘fundamental’
27 and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.”
28 Barker, 407 U.S. at 515.

³ With Regard to Petitioner’s original petition, the Court has utilized the page numbers
affixed to the top of the page by the Court’s electronic filing system.

1 Petitioner wrote “Federal Constitutional right to due process under 6th Amendment and
2 Fundamental Fairness” and again referenced “Attachment II” in the supporting facts
3 section. Id. at 7. Attachment II to the FAP is identical to Attachment II of the original
4 Petition.

5 The Court ordered Respondent to respond to the FAP (ECF No. 11) and
6 Respondent filed a motion to dismiss (ECF No. 14). Therein, Respondent argued the
7 FAP must be dismissed because grounds Two, Three, and Four were unexhausted. ECF
8 No. 14-1 at 3. Apparently relying on Attachment II, Respondent defined Petitioner’s
9 grounds for relief as follows:

10 (1) He was prejudiced by the pre-charging delay because the delay caused
11 the documents in his storage unit to be destroyed by the storage facility; (2)
12 the prosecution failed to gather exculpatory evidence from his storage unit
13 before the documents were destroyed; (3) the prosecution singled him out
14 for prosecution while ignoring the crimes committed by the prosecution
15 witnesses and filed charges against him it knew were false; and (4) the
16 prosecutor obstructed justice.

17 Id. at 2. In his opposition, Petitioner expressly (and vehemently) denies that Grounds
18 Two, Three, and Four are part of his FAP stating “Grounds two, three, and four,
19 discussed by [counsel for Respondent] are not charges in the First Amended Petition and
20 the petitioner denies these are even included in the First Amended Petition for Writ of
21 Habeas Corpus, now at the District Court.” ECF No. 16 at 6. Petitioner clarifies that
22 there are only two grounds for which he seeks relief in the FAP, and then quotes the two
23 grounds listed on pages six and seven of the main body of his FAP: Ground One,
24 “Federal Constitutional right to Speedy Trial including where there has been a substantial
25 and/or prejudicial delay prior to accusatory pleading;” and Ground Two, “Federal
26 Constitutional right to due process under 6th Amendment and Fundamental Fairness” Id.
27 at 4.

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1 **II. SCOPE OF REVIEW**

2 Title 28, U.S.C. § 2254(a) sets forth the following scope of review for federal
3 habeas corpus claims:

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

8 28 U.S.C. § 2254(a).

9 **III. DISCUSSION**

10 Respondent’s sole basis for moving to dismiss Petitioner’s FAP is his contention
11 that three of Petitioner’s four claims are unexhausted, thus rendering the FAP a mixed
12 petition. ECF No. 14-1 at 3-5.

13 Federal habeas petitioners who wish to challenge either their state court conviction
14 or the length of their confinement in state prison must first exhaust state judicial
15 remedies. 28 U.S.C. § 2254(b), (c); Davila v. Davis, __ U.S. __, 137 S. Ct. 2058, 2064
16 (2017). “The exhaustion requirement is designed to avoid the ‘unseemly’ result of a
17 federal court ‘upset[ting] a state court conviction without’ first according the state courts
18 an ‘opportunity to ... correct a constitutional violation.’” Davila, 137 S. Ct. at 2064
19 (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)). “To provide the State with the
20 necessary ‘opportunity,’ the prisoner must ‘fairly present’ his claim in each appropriate
21 state court (including a state supreme court with powers of discretionary review), thereby
22 alerting that court to the federal nature of the claim.” Baldwin v. Reese, 541 U.S. 27, 29
23 (2004) (internal citation omitted). Fair presentation requires the petitioner to present both
24 the factual and legal basis for each claim to the state’s highest court. Greenway v.
25 Schriro, 653 F.3d 790, 801 (9th Cir. 2011). This includes indicating the federal nature of
26 the claim, which the petitioner may accomplish “by citing in conjunction with the claim
27 the federal source of law on which he relies or a case deciding such a claim on federal
28 grounds, or by simply labeling the claim ‘federal.’” Baldwin, 541 U.S. at 32.

1 If a habeas petition filed in federal court contains both exhausted and unexhausted
2 claims, it is considered a “mixed petition” and must be dismissed unless the petitioner
3 opts to withdraw any unexhausted claims and proceed only on exhausted claims. Pliler v.
4 Ford, 542 U.S. 225, 233 (2004) (citing Rose, 455 U.S. at 510).⁴

5 In the instant case, Petitioner disputes that the claims Respondent lists as Grounds
6 Two, Three, and Four are part of his FAP at all. ECF No. 16 at 4. Rather, he asserts that
7 “[t]here are two grounds [] which are petitioned for relief,” which are detailed in the body
8 of his FAP as follows:

9 Ground One: “Federal Constitutional right to Speedy Trial including
10 where there has been a substantial and/or prejudicial delay prior to
11 accusatory pleading.”

12 Ground Two: “Federal Constitutional right to due process under 6th
13 Amendment and Fundamental Fairness.”

14 ECF No. 16 at 4; ECF No. 10 at 6-7. Petitioner submits that these two claims are
15 exhausted. ECF No. 16 at 5.

16 The Court agrees that Petitioner exhausted both of these claims by fairly presenting
17 them to the California Supreme Court on discretionary review. In that state brief,
18 Petitioner argued that the prosecution’s substantial pre- and post-arraignment delays
19 prejudiced him and violated his rights to a speedy trial and due process under the Sixth
20 and Fourteenth Amendments (citing Klopfer, 386 U.S. at 224-25 and Barker, 407 U.S. at
21 530-33). See Lodgment 3 at 12-18. These arguments mirror his federal claims. Indeed,
22 even Respondent acknowledges that Petitioner exhausted the claim that he was
23 prejudiced by the pre-charging delay (Respondent’s Ground One). ECF No. 14-1 at 4-5.

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26 ⁴ Under limited circumstances, a stay and abeyance procedure is available if such action
27 is requested by the petitioner, but “district courts are not *required* to consider *sua sponte*
28 the stay-and-abeyance procedure.” Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir.
2007).

1 Additionally, the Court finds that, as part of his speedy trial and due process claims,
2 Petitioner presented to the state's highest court facts related to the prosecution's failure to
3 obtain potentially exculpatory documents from Petitioner's storage unit before they were
4 destroyed. Id. Thus, to the extent Respondent contends these facts support a separate,
5 unexhausted claim (Respondent's Ground Two), the Court disagrees.

6 The only question, then, is whether Petitioner's references to "Attachment II"
7 under the supporting facts sections of Grounds One and Two expanded his claims to
8 include claims for selective prosecution and obstruction of justice (what Respondent calls
9 Claims Three and Four). Ordinarily, the Court would construe Attachment II liberally as
10 raising these two additional claims and, because he is a *pro se* prisoner, excuse
11 Petitioner's failure to plead them correctly. See Zichko v. Idaho, 247 F.3d 1015, 1020
12 (9th Cir. 2001), as amended (June 5, 2001) (confirming that courts have a duty liberally
13 to construe *pro se* prisoner pleadings). However, in this case Petitioner expressly has
14 instructed the Court not to do so, stating "Grounds two, three, and four, discussed by
15 [counsel for Respondent] are not charges in the First Amended Petition and the petitioner
16 denies these are even included in the First Amended Petition for Writ of Habeas Corpus,
17 now at the District Court." ECF No. 16 at 6. Thus, to the extent uncertainty existed as to
18 whether the FAP included claims for selective prosecution and obstruction of justice,
19 Petitioner has abandoned them and clearly expressed his desire to proceed only on the
20 two grounds for relief state on pages 6 and 7 of his FAP. ECF No. 16 at 4. For this
21 reason, the Court finds that the FAP is fully exhausted and, therefore, **RECOMMENDS**
22 that Respondent's motion to dismiss be **DENIED**.

23 **IV. CONCLUSION**

24 For the foregoing reasons, this Court **RECOMMENDS** that Respondent's motion
25 to dismiss the FAP for failure to exhaust be **DENIED**. If the district judge adopts this
26 Report and Recommendation, this Court **FURTHER RECOMMENDS** that Respondent
27 be ordered to file an answer to the merits of the FAP on the two grounds Petitioner
28 identified in the FAP.

1 Any party may file written objections with the Court and serve a copy on all parties
2 by **January 24, 2018**. The document should be captioned “Objections to Report and
3 Recommendation.”

4 Any response to the objections shall be filed and served by **February 2, 2018**. The
5 parties are advised that failure to file objections within the specified time may waive the
6 right to raise those objections on appeal of the Court’s order. Robbins v. Carey, 481 F.3d
7 1143, 1146–47 (9th Cir. 2007).

8 **IT IS SO ORDERED.**

9 Dated: January 10, 2018

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11 Hon. Nita L. Stormes
12 United States Magistrate Judge
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