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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 THOMAS DANIEL BOVENSIEP,
12 Petitioner,

13 v.

14 DEAN BORDERS,
15 Respondent.
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Case No.: 17-cv-00074-GPC-NLS

**ORDER ADOPTING REPORT AND
RECOMMENDATION [Doc. No. 17]
AND DENYING RESPONDENT'S
MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS
[Doc. No. 14]**

17 Thomas Daniel Bovensiep, a state prisoner proceeding *pro se*, filed the operative
18 First Amended Petition for Writ of Habeas Corpus (“FAP”) pursuant to 28 U.S.C. § 2254
19 on March 20, 2017. (ECF No. 10.) The FAP essentially contains two sections. The first
20 is the ubiquitous § 2254 Form used by prisoners to assert habeas claims (ECF No. 10 (the
21 “Form” section)), and the second is a document labeled “Attachment II” (ECF No. 10-1
22 (the “Attachment” section)). In the Form section of the FAP, two claims are raised: (1) a
23 violation of Bovensiep’s constitutional speedy trial rights, and (2) a violation of
24 Bovensiep’s right to due process under the Sixth Amendment “and fundamental
25 fairness.” (ECF No. 10 at 6–7.) In the Attachment II section of the FAP, Bovensiep
26 discusses issues relating to destruction of evidence, selective prosecution, and obstruction
27 of justice. (ECF No. 11.)
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1 On August 31, 2017, Respondent filed a motion to dismiss the FAP. (ECF No.
2 14.) Respondent contends that while Bovenseip exhausted the claims in the Form section
3 of the FAP, he did not exhaust the claims asserted in the Attachment section of the FAP.
4 As a result, Respondent argues, the FAP should be dismissed as “mixed.” Bovensiep
5 filed a response in opposition on September 27, 2017, clarifying that he is alleging just
6 the claims in the Form section of the FAP. (ECF No. 16.)

7 On January 10, 2018, Magistrate Judge Nita L. Stormes issued a report and
8 recommendation (the “Report”) recommending that this Court deny Respondent’s motion
9 to dismiss in light of Bovenseip’s clarification. (ECF No. 12.) Judge Stormes’s order
10 instructed that objections to the Report must be filed by January 24, 2018. (*Id.* at 8.)
11 Neither party filed any objections.

12 After careful consideration of the pleadings and relevant exhibits submitted and for
13 the reasons set forth below, this Court **ADOPTS** the Report and **DENIES** Respondent’s
14 motion to dismiss.

15 DISCUSSION

16 I. Legal Standard

17 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b) set forth this Court’s
18 duties in connection with a report from a Magistrate Judge. The Court “may accept,
19 reject or modify, in whole or in part, the findings and recommendations made by the
20 magistrate.” 28 U.S.C. § 636(b). This Court need not review *de novo* portions of the
21 Report to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13
22 (9th Cir. 2005). Because neither party filed objections to the Report, this Court may
23 assume the correctness of Judge Stormes’s findings of fact and decide the motion on the
24 applicable law. *Campbell v. U.S. Dist. Ct. for the N. Dist. Of California*, 501 F.2d 196,
25 206 (9th Cir. 1974); *Johnson v. Nelson*, 142 F. Supp. 2d 1215, 1217 (S.D. Cal. 2001).

26 II. Analysis

27 Judge Stormes concluded that the motion to dismiss should be denied because, in
28 light of Bovensiep’s clarification, only the claims in the Form section of the FAP remain,

1 and those claims were exhausted. (ECF No. 14.) To present a claim in a federal petition
2 for writ of habeas corpus, the petitioner must first exhaust all state remedies. 28 U.S.C.
3 § 2254(b)-(c); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Motivated by the preservation
4 of federal-state comity, this requirement grants state courts the “initial ‘opportunity to
5 pass upon and correct’ alleged violations of its prisoners’ federal rights.” *Picard v.*
6 *Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250
7 (1971)) (per curiam)). To exhaust a claim, a petition must present “both the operative
8 facts and the federal legal theory on which his claim is based.” *Kelly v. Small*, 315 F.3d
9 1063, 1066 (9th Cir. 2002) *overruled on other grounds by Robbins v. Carey*, 481 F.3d
10 1134, 1149 (9th Cir. 2007). To exhaust all state remedies, a petitioner must fairly present
11 all claims to the highest state court. *McQuown v. McCartney*, 795 F.2d 807, 809 (9th
12 Cir.1986). A California prisoner must present his claim to the Supreme Court of
13 California on direct review or collateral review. See *Reiger v. Christensen*, 789 F.2d
14 1425, 1427 (9th Cir. 1986).

15 Respondent does not contest the adequacy of Bovensiep’s presentation to the
16 California Supreme Court as to the two claims listed in the Form section of the FAP, but
17 rather contends Bovensiep has added additional unexhausted claims in the Attachment
18 section. Respondent describes the FAP as asserting four grounds: (1) “he was prejudiced
19 by the pre-charging delay because the delay caused the documents in his storage unit to
20 be destroyed by the storage facility”; (2) “the prosecution failed to gather exculpatory
21 evidence from his storage unit before the documents were destroyed”; (3) “the
22 prosecution singled him out for prosecution while ignoring the crimes committed by the
23 prosecution witnesses and filed charges against him it knew were false”; and (4) the
24 prosecutor obstructed justice.” (ECF No. 14-1 at 2.) The two claims asserted in the
25 Form section of the FAP fall within the first ground; the three claims included in the
26 Attachment section of the FAP fall within the second, third, and fourth grounds.
27 Respondent states that while the first ground “appears to correspond to the claim raised
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1 on discretionary review in the California Supreme Court,” the second, third, and fourth
2 grounds were not. (*Id.* at 4.)

3 In his response to the motion, Bovensiep clarifies that “[g]rounds two, three, and
4 four, discussed by [counsel for Respondent] are not charges in the First Amended Petition
5 and the petitioner denies these are even included in the First Amended Petition for Writ
6 of Habeas Corpus.” (ECF No. 16 at 6.) In other words, assuming that Bovensiep
7 originally intended to assert claims based on the three grounds raised in the Attachment
8 section of the FAP, he has now abandoned those claims. In light of this clarification—
9 and Respondent’s concession that the remaining ground was argued to the California
10 Supreme Court—the Court finds the FAP to be fully exhausted.

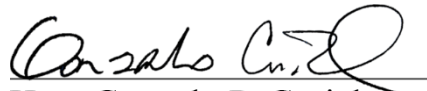
11 Because the Court agrees with Judge Stormes’s conclusion that Bovensiep has
12 abandoned his unexhausted claims, and the claims that remain have been exhausted, the
13 Court ADOPTS the Report and Recommendation.

14 **CONCLUSION AND ORDER**

15 For the reasons set forth above, **IT IS HEREBY ORDERED:**

- 16 1. The finding and conclusions of Judge Stormes presented in the Report (Doc. No.
17 17 are **ADOPTED** in their entirety;
- 18 2. Respondent’s Motion to Dismiss (Doc. No. 14) is **DENIED**.

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20 Dated: March 19, 2018


21 Hon. Gonzalo P. Curiel
22 United States District Judge
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