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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DEREK L. BLANKS,

Petitioner,

v.

TIMOTHY WENGLER, *et al.*,

Respondents.

Case No. C08-5543 BHS/KLS

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
May 22, 2009**

This habeas corpus action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Mr. Blanks has filed a mixed petition consisting of exhausted and unexhausted claims for habeas relief. The Court provided Mr. Blanks with the choice of returning to state court to exhaust his claims or of amending and resubmitting the habeas petition to present only the exhausted claims to this Court. Mr. Blanks has chosen to return to state court.

**I. DISCUSSION**

On September 10, 2008, Petitioner Derek L. Blanks filed his habeas corpus petition, seeking to challenge his 2004 conviction by plea for first degree child molestation. Dkt. # 5. Mr. Blanks states nine claims for relief. *Id.* On January 12, 2009, Respondents filed an answer, stating that Mr.

1 Blanks had failed to exhaust six of his habeas claims and part of a seventh because he failed to  
2 properly raise them at every level of the state courts' review. Dkt. # 17. Respondents argue that  
3 Mr. Blanks' three exhausted claims are without merit and ask that the petition be dismissed with  
4 prejudice or, alternatively that Mr. Blanks be advised of his options regarding his mixed petition.  
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6 *Id.*, p. 17.

7 On March 16, 2009, Mr. Blanks filed a motion for stay and abeyance, requesting that this  
8 matter be stayed while he returns to state court "to exhaust the unexhausted Habeas Corpus Petition  
9 Grounds; 2(b), 3, 4, 5, 6, 9(1) & (2)." Dkt. # 19, pp. 1-2. Respondents filed no response to the  
10 motion for stay and abeyance.

11 Upon review, the undersigned found that a stay and abeyance was inappropriate, but that  
12 Mr. Blanks should be allowed to delete the unexhausted claims and proceed with his exhausted  
13 claims, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). Dkt. # 20.<sup>1</sup> Alternatively, the Court  
14 advised Mr. Blanks that if he preferred, he could first return to state court to exhaust his  
15 unexhausted claims first. *Id.* In that regard, Mr. Blanks was cautioned that his time is running to do  
16 so as the mandate was entered by the Washington Court of Appeals on July 17, 2008. (Dkt. # 18,  
17 Exh. 9).

18  
19 On April 23, 2009, Petitioner Blanks filed his response to the Court's Order, stating that he  
20 wishes to return to the state court to exhaust his unexhausted claims and asks that the Court dismiss  
21 his federal habeas petition without prejudice. Dkt. # 21, pp. 1-2.  
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24 <sup>1</sup>The parties agreed that Mr. Blanks has failed to exhaust the second half of Claim 2 and  
25 Claims 3, 4, 5, 6, and 9. However, Respondents argued that Mr. Blanks has also failed to exhaust  
26 Claim 7. Dkt. # 17, p. 8. The Court's review of the record confirmed that as to Claim 7, Mr.  
27 Blanks raised this issue as a federal constitutional claim in the Washington Court of Appeals (*see*  
28 Dkt. # 18, Exh. 4, pp. 17-18) and that he raised it in the Washington Supreme Court. *Id.*; Exh. 7 at  
10. Thus, Mr. Blanks was correct that his unexhausted claims are 2(b), 3, 4, 5, 6 and 9.

1 Before dismissing a mixed petition containing both exhausted and unexhausted claims the  
2 court is generally required to provide petitioner with “the choice of returning to state court to  
3 exhaust his claims or of amending and resubmitting the habeas petition to present only exhausted  
4 claims to the district court.” *Rose v. Lundy*, 455 U.S. 509, 518-22 (1982); *see also Rhines*, 544 U.S.  
5 at 278; *Tillema v. Long*, 253 F.3d 494, 503 (9<sup>th</sup> Cir. 2001) (court must provide *habeas corpus*  
6 litigant with opportunity to amend mixed petition by striking unexhausted claims).  
7

## 8 V. CONCLUSION

9 Mr. Blanks chooses to return to state court. Accordingly, his federal habeas petition should  
10 be **DISMISSED WITHOUT PREJUDICE**.

11 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,  
12 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
13 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
14 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time  
15 limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **May 22,**  
16 **2009**, as noted in the caption.  
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18 Dated this 5th day of May, 2009.  
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21 Karen L. Strombom  
22 United States Magistrate Judge  
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