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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

LUIS GREGORIO BARBA,
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) Petitioner,
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) v.
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)
) KNIPP, WARDEN,
)
)
) Respondent.
)

Case No. CV 12-6248-VAP (MLG)
 MEMORANDUM OPINION AND ORDER
 DISMISSING PETITION WITHOUT
 PREJUDICE

I. Procedural Background

Luis Gregorio Barba, who is a California state prisoner, filed this pro se petition for writ of habeas corpus on July 19, 2012. The petition relates that in June 2011, Petitioner was found guilty of murder in the Los Angeles County Superior Court. He was sentenced to a term of life in prison.

A review of the petition as well as the California Appellate Court Case Information Website¹ revealed that at the time this petition was filed, Petitioner's direct appeal was still pending in the California Court of Appeal. *People v. Barba, et al.*, Case No. B233355. Indeed, the court of appeal docket revealed that

¹ <http://appellatecases.courtinfo.ca.gov/index.html>.

1 Barba's opening brief was filed by counsel only on July 11, 2012.
2 That brief, and the claims raised in that brief, were filed by
3 Petitioner as part of the habeas corpus petition in this case. On
4 July 30, 2012, Magistrate Judge Marc L. Goldman issued an order
5 directing Petitioner to show cause in writing, on or before August
6 27, 2012, why the petition should not be dismissed without
7 prejudice for failure to exhaust state remedies. Petitioner did
8 not respond to the order in the time allowed. Accordingly, the
9 petition will be dismissed without prejudice.

10
11 **II. Screening of Petitions**

12 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases
13 in the United States District Court, a district court may
14 summarily dismiss a habeas corpus petition, *before the respondent*
15 *files an answer*, "[i]f it plainly appears from the face of the
16 petition ... that the petitioner is not entitled to relief." The
17 notes to Rule 4 state: "[A] dismissal may be called for on
18 procedural grounds, which may avoid burdening the respondent with
19 the necessity of filing an answer on the substantive merits of the
20 petition." See *Boyd v. Thompson*, 147 F.3d 1124, 1127-28 (9th Cir.
21 1998). This is an appropriate case for invoking Rule 4.

22
23 **III. Exhaustion of Remedies**

24 A federal court will not grant a state prisoner's petition
25 for writ of habeas corpus unless it appears that the prisoner has
26 exhausted available state remedies as to all of the claims in the
27 petition. 28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509,
28 518 (1982); *Hayes v. Kincheloe*, 784 F.2d 1434, 1437 (9th Cir.

1 1986) (citing *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir.
2 1979)). "For reasons of federalism, 28 U.S.C. § 2254 requires
3 federal courts to give the states an initial opportunity to
4 correct alleged violations of its prisoners' federal rights."
5 *Kellotat v. Cupp*, 719 F.2d 1027, 1029 (9th Cir. 1983); see also
6 *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006). Each
7 federal constitutional claim must be presented to the state
8 supreme court even if that court's review is discretionary.
9 *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999); *Insyxiengmay v.*
10 *Morgan*, 403 F.3d 657, 667-68 (9th Cir. 2005). Such a requirement
11 affords state courts an opportunity to consider and correct any
12 violation of federal law, thus demonstrating respect for our dual
13 judicial system while also providing a complete record of a
14 petitioner's federal claim as litigated in the state system. *Rose*,
15 455 U.S. at 518-19.

16 The exhaustion doctrine requires a petitioner to provide the
17 state courts with one full opportunity to rule on his federal
18 habeas claims before presenting those claims to the federal
19 courts. *O'Sullivan*, 526 U.S. at 844-45; *Insyxiengmay*, 403 F.3d at
20 667. A petitioner must alert the state courts to the fact that he
21 is asserting a federal claim in order to fairly and fully present
22 the legal basis of the claim. *Duncan v. Henry*, 513 U.S. 364, 365-
23 66 (1995); *Reynoso*, 462 F.3d at 1109; *Insyxiengmay*, 403 F.3d at
24 668. The petitioner must make the federal basis of the claim
25 explicit either by specifying particular provisions of the federal
26 constitution or statutes, or by citing to federal case law.
27 *Insyxiengmay*, 403 F.3d at 668.

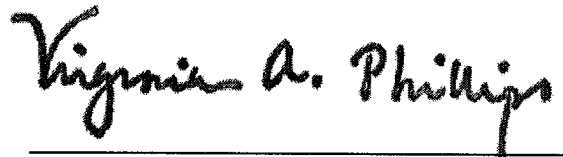
28 Here, Petitioner has never submitted the claims for relief

1 presented in this petition to the California Supreme Court, by way
2 of either direct review or petitions for post-conviction relief.
3 Indeed, the claims are still pending on direct appeal in the
4 California Court of Appeal, with Respondent's brief not even due
5 until October 9, 2012. A state supreme court decision on the
6 issues presented, either on the merits or on a procedural basis,
7 is required for exhaustion.

8 Petitioner has been given an opportunity to present his
9 position on the issue of summary dismissal as required by Supreme
10 Court precedent. *Day v. McDonough*, 547 U.S. 198, 210 (2006). He
11 failed to do so. Accordingly, IT IS ORDERED that the petition for
12 writ of habeas corpus be dismissed without prejudice for failure
13 to exhaust state remedies.

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Dated: September 6, 2012



Virginia A. Phillips
United States District Judge

Presented by:



Marc L. Goldman
United States Magistrate Judge