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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EDWIN VINCENT MUNIS,

1:09-cv-02090-LJO-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF
PETITION WITHOUT PREJUDICE FOR
FAILURE TO EXHAUST STATE JUDICIAL
REMEDIES

v.

C. NOLL, Warden

[Docs. 1, 9]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on November 17, 2009, in the United States District Court for the Northern District of California. (Court Doc. 1.) On November 23, 2009, the petition was transferred to this Court. (Court Doc. 3.)

On December 17, 2009, the Court issued an order to show cause why the petition should not be dismissed for failure to exhaust the administrative remedies. (Court Doc. 8.) Petitioner filed a response to the order on December 29, 2009. (Court Doc. 9.)

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). Otherwise,

1 the Court will order Respondent to respond to the petition. Rule 5 of the Rules Governing §
2 2254 Cases.

3 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
4 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
5 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
6 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
7 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d
8 1158, 1163 (9th Cir. 1988).

9 A petitioner can satisfy the exhaustion requirement by providing the highest state court
10 with a full and fair opportunity to consider each claim before presenting it to the federal court.
11 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);
12 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest
13 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the
14 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);
15 Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

16 Additionally, the petitioner must have specifically told the state court that he was raising a
17 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
18 669 (9th Cir.2000), amended, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th
19 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
20 Supreme Court reiterated the rule as follows:

21 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
22 of state remedies requires that petitioners "fairly presen[t]" federal claims to the
23 state courts in order to give the State the "'opportunity to pass upon and correct
24 alleged violations of the prisoners' federal rights" (some internal quotation marks
25 omitted). If state courts are to be given the opportunity to correct alleged violations
26 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
27 are asserting claims under the United States Constitution. If a habeas petitioner
28 wishes to claim that an evidentiary ruling at a state court trial denied him the due
process of law guaranteed by the Fourteenth Amendment, he must say so, not only
in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal claims in state court *unless he specifically indicated to*

1 *that court that those claims were based on federal law. See Shumway v. Payne,*
2 *223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in*
3 *Duncan, this court has held that the petitioner must make the federal basis of the*
4 *claim explicit either by citing federal law or the decisions of federal courts, even*
5 *if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889*
6 *(9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the*
7 *underlying claim would be decided under state law on the same considerations*
8 *that would control resolution of the claim on federal grounds. Hiivala v. Wood,*
9 *195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31*
10 *(9th Cir. 1996);*

11 In Johnson, we explained that the petitioner must alert the state court to
12 the fact that the relevant claim is a federal one without regard to how similar the
13 state and federal standards for reviewing the claim may be or how obvious the
14 violation of federal law is.

15 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

16 Petitioner states that the Stanislaus County Superior Court denied his state petition for
17 writ of habeas corpus on December 11, 2009. (Id. at 1.) Petitioner indicates that he has also
18 prepared a state petition for the appellate court. (Id.) Accordingly, it is clear that the instant
19 federal petition is unexhausted and must be dismissed without prejudice to re-filing after
20 exhaustion of the state judicial remedies.

21 RECOMMENDATION

22 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 23 1. The instant federal petition for writ of habeas corpus be DISMISSED without
24 prejudice; and
- 25 2. The Clerk of Court be directed to terminate this action in its entirety.

26 This Findings and Recommendation is submitted to the assigned United States District
27 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of
28 the Local Rules of Practice for the United States District Court, Eastern District of California.
Within thirty (30) days after being served with a copy, any party may file written objections with
the court and serve a copy on all parties. Such a document should be captioned "Objections to
Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and

1 filed within fourteen (14) after service of the objections. The Court will then review the
2 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
3 failure to file objections within the specified time may waive the right to appeal the District
4 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5
6 IT IS SO ORDERED.

7 **Dated: January 4, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE