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7 **UNITED STATES DISTRICT COURT**  
8 **CENTRAL DISTRICT OF CALIFORNIA**  
9 **WESTERN DIVISION**  
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11 LEVI MICAH BARTER,

12 Petitioner,

13 v.

14 JERRY BROWN, et al.,

15 Respondents.  
16

No. CV 14-3089-DMG (PLA)

**SECOND ORDER TO SHOW CAUSE RE  
EXHAUSTION**

17 **INTRODUCTION**

18 On March 31, 2014, Levi Micah Barter ("petitioner"), who is currently confined at the Kern  
19 Valley State Prison, in Delano, California, filed a Petition for Writ of Habeas Corpus pursuant to  
20 28 U.S.C. § 2254 (the "March 31 Petition") in Case No. CV 14-2418-DMG (PLA). According to  
21 the March 31 Petition, petitioner was challenging his 2009 conviction in the Los Angeles County  
22 Superior Court under California Penal Code §§ 245(a)(1), 12022.7(a). (See March 31 Petition at  
23 1-2). On April 29, 2014, following petitioner's response to an Order to Show Cause ("OSC") that  
24 failed to address the issue of exhaustion, the District Judge dismissed the March 31 Petition  
25 without prejudice for lack of exhaustion. A subsequent filing by petitioner in that case, which was  
26 construed as a Motion pursuant to Federal Rule of Civil Procedure 60(b), did address the issue  
27 of exhaustion, and indicated, for the first time, that petitioner had filed a petition for habeas corpus  
28 in the California Supreme Court, in Case No. S217159. Petitioner waited until after the March 31

Petition had already been dismissed before providing any information about his state supreme court filing, and even then failed to provide any information about the grounds raised in his state petition.

On April 1, 2014, a separate habeas petition, originally filed by petitioner in the United States District Court for the Eastern District of California (“Eastern District Petition”), was transferred to this Court in Case No. CV 14-2593-DMG (PLA). On April 29, 2014, following petitioner’s response to an OSC regarding exhaustion of the grounds included in the Eastern District Petition, the District Judge dismissed the Eastern District Petition without prejudice for lack of exhaustion. The District Judge denied a subsequent motion for reconsideration. In a second motion for reconsideration in that case, petitioner indicated for the first time that he had filed a petition for habeas corpus in the California Supreme Court, and provided the same case information as he provided in his motion for reconsideration in Case No. CV 14-2418-DMG (PLA).

On April 17, 2014, petitioner’s instant Petition for Writ of Habeas Corpus by a Person in State Custody was transferred to this Court from the United States District Court for the Southern District of California in Case No. CV 14-3089-DMG (PLA) (“Petition”). In the Petition, petitioner raised essentially the same four grounds for relief as in the March 31 Petition and the Eastern District Petition. (Compare Petition at 6-9, with March 31 Petition at 6-9, Eastern District Petition at 5-6). On April 28, 2014, because the Petition indicated that none of the four grounds for relief was exhausted, and for the same reasons as in the other two cases, the Court ordered petitioner to show cause why the instant Petition should not be dismissed without prejudice for failure to exhaust state remedies. Based on information recently provided by petitioner in the other two cases, it now appears that petitioner may have exhausted his state judicial remedies.

## **DISCUSSION**

As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The habeas statute explicitly provides that a habeas petition brought by a person in state custody “shall

1 not be granted unless it appears that -- (A) the applicant has exhausted the remedies available  
2 in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii)  
3 circumstances exist that render such process ineffective to protect the rights of the applicant.” 28  
4 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived  
5 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

6 Exhaustion requires that petitioner’s contentions be fairly presented to the state supreme  
7 court even if that court’s review is discretionary. O’Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119  
8 S.Ct. 1728, 144 L.Ed.2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077, n.3 (9th Cir. 2000).  
9 Petitioner must give the state courts “one full opportunity to resolve any constitutional issues by  
10 invoking one complete round of the State’s established appellate review process” in order to  
11 exhaust his claims. O’Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the  
12 prisoner has described in the state court proceedings both the operative facts and the federal legal  
13 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887,  
14 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438  
15 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. California Dep’t of  
16 Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,  
17 218 F.3d 1017 (9th Cir. 2000). Petitioner has the burden of demonstrating that he has exhausted  
18 available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

19 Here, while it appears from the filings in this case that petitioner has not exhausted his state  
20 judicial remedies in connection with this matter,<sup>1</sup> based on petitioner’s filings in his two other  
21 habeas actions (Case No. CV 14-2418-DMG (PLA) and Case No. CV 14-2593-DMG (PLA)), it  
22 appears that petitioner may have exhausted his state court remedies. Specifically, in those cases,  
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26 <sup>1</sup> Petitioner represents that he has not filed any “petitions, applications, or motions ... with  
27 respect to this judgment” in the California Court of Appeal. (See Petition at 3). He further indicates  
28 that he “did not file a petition, application or motion ... with the California Supreme Court[] containing  
the grounds raised in this federal Petition” because “this is a federal question based on ‘Apprendi v.  
New Jersey’ and all related law cited.” (See Petition at 5).


1 despite his assertions to the contrary in this case, petitioner has indicated that he filed a state  
2 habeas petition in the California Supreme Court, in Case No. S217159.<sup>2</sup>

3  
4 **ORDER**

5 For the foregoing reasons, **no later than June 4, 2014**, petitioner is ordered to show cause  
6 why the Petition should not be dismissed without prejudice for failure to exhaust state remedies.  
7 Filing by petitioner of an Amended Petition in this action (No. CV 14-3089-DMG (PLA)) -- on the  
8 Central District of California's form Petition for Writ of Habeas Corpus -- clearly showing that  
9 petitioner has exhausted his state judicial remedies, as well as filing a complete copy of the state  
10 habeas corpus petition that was denied by the California Supreme Court on April 23, 2014, shall  
11 be deemed compliance with this Order to Show Cause. **Petitioner is advised that his failure**  
12 **to show in his Amended Petition that he has exhausted his state judicial remedies,**  
13 **including by providing the Court with a copy of his California Supreme Court habeas**  
14 **petition, will result in the action being dismissed for lack of exhaustion. Petitioner is**  
15 **further advised that his failure to timely respond to this Order will result in the action being**  
16 **dismissed for failure to prosecute and failure to follow Court orders.**

17 The Court Clerk is directed to send petitioner a copy of his current Petition, together with  
18 blank copies of the forms required when filing a Petition for Writ of Habeas Corpus by a Person  
19 in State Custody. Any Amended Petition or other filing with the Court shall use the case number  
20 assigned to this action.

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22 DATED: May 21, 2014

  
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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE

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27 <sup>2</sup> The Court has confirmed that petitioner filed a habeas petition in the California Supreme  
28 Court on March 17, 2014, which was denied on April 23, 2014. See California Appellate Courts  
Case Information website at <http://appellatecases.courtinfo.ca.gov>.