

1 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th
2 Cir. 1988).

3 A petitioner can satisfy the exhaustion requirement by providing the highest state
4 court with a full and fair opportunity to consider each claim before presenting it to the federal
5 court. Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88
6 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given
7 a full and fair opportunity to hear a claim if the petitioner has presented the highest state
8 court with the claim's factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct.
9 887, 888 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719
10 (1992) (factual basis). Additionally, the petitioner must have specifically told the state court
11 that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at
12 888; Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner
13 wishes to claim that the trial court violated his due process rights "he must say so, not only in
14 federal court but in state court." Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general
15 appeal to a constitutional guarantee is insufficient to present the "substance" of such a
16 federal claim to a state court. See, Anderson v. Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982)
17 (Exhaustion requirement not satisfied circumstance that the "due process ramifications" of an
18 argument might be "self-evident."); Gray v. Netherland, 518 U.S. 152, 162-63, 116 S.Ct.
19 1074 (1996) ("a claim for relief in habeas corpus must include reference to a specific federal
20 constitutional guarantee, as well as a statement of the facts which entitle the petitioner to
21 relief.").

22 In the present case, it appears from the petition that Petitioner has not exhausted his
23 state judicial remedies in regard to the claim raised in his habeas corpus petition.
24 Specifically, the court finds that Petitioner cannot have done so, because he was not
25 incarcerated until July 7, 2005, five days before he filed his petition in this court.
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1 In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act.
2 Pub.L. No 104-132, 110 Stat. 1214. Under the AEDPA, exhaustion can be waived by
3 respondent. 28 U.S.C. § 2254(b)(C). The Court can also excuse exhaustion if “(I) there is an
4 absence of available State corrective process; or (ii) circumstances exist that render such a
5 process ineffective to protect the rights of the application.” 28 U.S.C. § 2254(b)(1)(B). In
6 this case, respondent has not waived exhaustion. In addition, California provides avenues for
7 Petitioner to pursue state claims. For example, these claims may be presented in a petition
8 for writ of habeas corpus. See Cal. Penal Code §§ 1473 - 14758.

9 Finally, there are not sufficient circumstances in this case for the Court to ignore the
10 United States Supreme Court’s admonishment that comity demands exhaustion and find that
11 California’s corrective processes are ineffective to protect Petitioner’s rights.

12 Based on the foregoing, IT IS HEREBY RECOMMENDED that this petition be
13 dismissed without prejudice for failure to exhaust state remedies.

14 These Findings and Recommendation are submitted to the assigned United States
15 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
16 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
17 California. Within thirty (30) days after being served with a copy, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be
19 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
20 objections shall be served and filed within ten (10) court days (plus three days if served by
21 mail) after service of the objections. The court will then review the Magistrate Judge’s
22 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
23 objections within the specified time may waive the right to appeal the District Court’s order.
24 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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26 IT IS SO ORDERED.

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Dated: July 15, 2005
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/s/ William M. Wunderlich
UNITED STATES MAGISTRATE JUDGE