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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ANTONIO V. MONTANO,	)	1:06-CV-0044 OWW LJO HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION
	)	REGARDING PETITION FOR WRIT OF
v.	)	HABEAS CORPUS
	)	
	)	[Doc. #1]
STANISLAUS COUNTY, et al.,	)	
	)	
Respondents.	)	

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

On December 8, 1994, Petitioner was convicted in the Stanislaus County Superior Court of attempted murder. See Petition, p. 1. Petitioner was sentenced to serve an indeterminate term of life plus three years in state prison with the possibility of parole. Id.

On December 30, 2005, Petitioner filed the instant federal petition for writ of habeas corpus in the Sacramento Division of the United States District Court for the Eastern District of California. On January 13, 2006, the matter was transferred to the Fresno Division and received in this Court.

**DISCUSSION**

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review

1 of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears  
2 from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing  
3 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). The Advisory Committee  
4 Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its  
5 own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the  
6 petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

7 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
8 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
9 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
10 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
11 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198,  
12 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9<sup>th</sup> Cir. 1988).

13 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
14 full and fair opportunity to consider each claim before presenting it to the federal court. Picard v.  
15 Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9<sup>th</sup> Cir.  
16 1996). A federal court will find that the highest state court was given a full and fair opportunity to  
17 hear a claim if the petitioner has presented the highest state court with the claim's factual and legal  
18 basis. Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S.  
19 1 (1992) (factual basis).

20 Additionally, the petitioner must have specifically told the state court that he was raising a  
21 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669  
22 (9<sup>th</sup> Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.1999);  
23 Keating v. Hood, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir.1998). In Duncan, the United States Supreme Court  
24 reiterated the rule as follows:

25 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion  
26 of state remedies requires that petitioners "fairly presen[t]" federal claims to the  
27 state courts in order to give the State the "opportunity to pass upon and correct  
28 alleged violations of the prisoners' federal rights" (some internal quotation marks  
omitted). If state courts are to be given the opportunity to correct alleged violations  
of prisoners' federal rights, they must surely be alerted to the fact that the prisoners  
are asserting claims under the United States Constitution. If a habeas petitioner

1 wishes to claim that an evidentiary ruling at a state court trial denied him the due  
2 process of law guaranteed by the Fourteenth Amendment, he must say so, not only  
in federal court, but in state court.

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

4 Our rule is that a state prisoner has not "fairly presented" (and thus  
5 exhausted) his federal claims in state court *unless he specifically indicated to*  
6 *that court that those claims were based on federal law.* See Shumway v. Payne,  
7 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in  
8 Duncan, this court has held that the *petitioner must make the federal basis of the*  
9 *claim explicit either by citing federal law or the decisions of federal courts, even*  
10 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889  
11 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
12 underlying claim would be decided under state law on the same considerations  
13 that would control resolution of the claim on federal grounds. Hiivala v. Wood,  
14 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
15 (9th Cir. 1996); . . . .

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

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

21 In this case, Petitioner states that he has never sought relief in the California Supreme Court.  
22 Therefore, the instant petition appears to be unexhausted. The Court must dismiss an unexhausted  
23 petition to give Petitioner an opportunity to return to state court to exhaust his claims. 28 U.S.C. §  
24 2254(b)(1); Rose, 455 U.S. at 521-22; Jiminez v. Rice, 276 F.3d 478, 481 (9<sup>th</sup> Cir.2001).

### 25 RECOMMENDATION

26 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be  
27 DISMISSED without prejudice.<sup>1</sup> Petitioner is forewarned that there is a one year limitations period  
28 in which Petitioner must file a federal petition for writ of habeas corpus. 28 U.S.C. §2244(d)(1). In

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<sup>1</sup>A dismissal for failure to exhaust is not a dismissal on the merits, and Petitioner will not be barred from returning to federal court after Petitioner exhausts available state remedies by 28 U.S.C. § 2244 (b)'s prohibition on filing second petitions. See In re Turner, 101 F.3d 1323 (9<sup>th</sup> Cir. 1996). However, the Supreme Court has held that:

[I]n the habeas corpus context it would be appropriate for an order dismissing a mixed petition to instruct an applicant that upon his return to federal court he is to bring only exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made aware of the exhaustion requirement, no reason exists for him not to exhaust all potential claims before returning to federal court. The failure to comply with an order of the court is grounds for dismissal with prejudice. Fed. Rules Civ. Proc. 41(b).

Slack v. McDaniel, 529 U.S. 473, 489 (2000). Therefore, Petitioner is forewarned that in the event he returns to federal court and files a mixed petition of exhausted and unexhausted claims, the petition may be dismissed with prejudice.

1 most cases, the one year period starts to run on the date the California Supreme Court denies  
2 Petitioner's direct review. Rose v. Lundy, 455 U.S. 509, 521-522. The limitations period is tolled  
3 while a properly filed request for collateral review is pending in state court. 28 U.S.C. § 2244(d)(2).  
4 However, the limitations period is not tolled for the time such an application is pending in federal  
5 court. Duncan v. Walker, 121 S.Ct. 2120, 2129 (2001).

6 This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United  
7 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304  
8 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
9 Within thirty (30) days after being served with a copy, any party may file written objections with the  
10 court and serve a copy on all parties. Such a document should be captioned "Objections to  
11 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and  
12 filed within ten (10) court days (plus three days if served by mail) after service of the objections.  
13 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The  
14 parties are advised that failure to file objections within the specified time may waive the right to  
15 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 IT IS SO ORDERED.

17 **Dated: January 25, 2006**  
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/s/ Lawrence J. O'Neill  
UNITED STATES MAGISTRATE JUDGE

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