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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID MICHAEL ALVARADO,

1:07-CV-00994 OWW DLB HC

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

JAMES A. YATES,

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 July 12, 2007.

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

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial

1 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
 2 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d
 3 1158, 1163 (9th Cir. 1988).

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

11 Additionally, the petitioner must have specifically told the state court that he was raising
 12 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
 13 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
 14 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
 15 Supreme Court reiterated the rule as follows:

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

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

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

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

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

6 In the instant petition, Petitioner states that a petition for review was not filed at the
7 California Supreme Court and he currently has a petition for writ of habeas corpus pending at the
8 California Supreme Court. (Petition, at 4.) Accordingly, Petitioner has conceded that the instant
9 petition is unexhausted. The Court must dismiss without prejudice a petition that contains
10 unexhausted claims. 28 U.S.C. § 2254(b)(1); Rose, 455 U.S. at 521-22.

11 RECOMMENDATION

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

- 13 1. The instant petition for writ of habeas corpus be DISMISSED, without prejudice;
14 and
- 15 2. This action be terminated.

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

27 IT IS SO ORDERED.

28 **Dated: July 21, 2007**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE