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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN LOUIS RICHARDS,)	1:07-cv-01805 LJO YNP DLB (HC)
)	
Petitioner,)	
)	ORDER GRANTING PETITIONER LEAVE
v.)	TO WITHDRAW UNEXHAUSTED CLAIMS
)	
THE PEOPLE, et. al.,)	
Respondent.)	

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

BACKGROUND¹

On November 30, 2005, Petitioner was sentenced to ninety-five year to life after a jury found him guilty of first degree burglary (Cal Penal Code § 459), attempted burglary (Cal. Pen. Code § 664/459), burglary (Cal. Pen. Code § 459), passing an altered or forged check (Cal. Pen. Code §470(d)), and misdemeanor resisting arrest (Cal. Pen. Code §148), plus several prior convictions (Cal. Pen. Code § 667(a), (d)).

The California Court of Appeal, Fifth Appellate District, reversed and remanded the case to

¹This information is derived from the petition for writ of habeas corpus, Respondent’s motion to dismiss the petition.

1 the trial court to conduct a postconviction Marsden hearing. The trial court denied Petitioner’s
2 Marsden motion and motion for a new trial and reinstated the conviction. Petitioner was resentedenced
3 to eighty-five years to life.

4 Petitioner filed for review with the California Supreme Court and was denied on February 21,
5 2007.

6 Petitioner filed the current petition on December 7, 2007 and Respondent filed a motion to
7 dismiss on January, 29, 2009. Petitioner filed no opposition to Respondent’s motion. It is the
8 motion to dismiss that we will consider here.

9 **DISCUSSION**

10 A. Procedural Grounds for Motion to Dismiss

11 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
12 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
13 entitled to relief in the district court” The Advisory Committee Notes to Rule 5 of the Rules
14 Governing § 2254 Cases state that “an alleged failure to exhaust state remedies may be raised by the
15 attorney general, thus avoiding the necessity of a formal answer as to that ground.” The Ninth
16 Circuit has referred to a respondent’s motion to dismiss on the ground that the petitioner failed to
17 exhaust state remedies as a request for the Court to dismiss under Rule 4 of the Rules Governing
18 § 2254 Cases. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d
19 599, 602-03 (9th Cir. 1989); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982).
20 Based on the Rules Governing Section 2254 Cases and case law, the Court will review Respondent’s
21 motion for dismissal pursuant to its authority under Rule 4.

22 B. Exhaustion of State Remedies

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

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

8 Additionally, the petitioner must have specifically told the state court that he was raising a
9 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
10 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999);
11 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States Supreme Court
12 reiterated the rule as follows:

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

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

24 Our rule is that a state prisoner has not "fairly presented" (and thus
25 exhausted) his federal claims in state court *unless he specifically indicated to
26 that court that those claims were based on federal law. See Shumway v. Payne*,
27 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
28 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);

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

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

1 Petitioner raises four ground for relief in his petition. Respondent argues that ground one is
2 unexhausted so the entire petition should be dismissed as a mixed petition. In ground one, Petitioner
3 claims ineffective assistance of council, a claim that was raised in his appeal to the state appellate
4 court but not the state supreme court. By not raising ineffective assistance of counsel at the state
5 supreme court, Petitioner did not give the high court a full and fair opportunity to hear that issue,
6 therefore it remains unexhausted. Respondent concedes that ground two, three, and four are all
7 exhausted.

8 The instant petition is a mixed petition containing exhausted and unexhausted claims. The
9 Court must dismiss a mixed petition without prejudice to give Petitioner an opportunity to exhaust
10 the claim if he can do so. See Rose, 455 U.S. at 521-22. However, Petitioner may withdraw the
11 unexhausted claims and go forward with the exhausted claims in lieu of suffering dismissal.

12 ORDER

13 Accordingly, IT IS HEREBY ORDERED that Petitioner is GRANTED thirty (30) days from
14 the date of service of this order to file a motion to withdraw the unexhausted claims. In the event
15 Petitioner does not file such a motion, the Court will assume Petitioner desires to return to state court
16 to exhaust the unexhausted claims and will therefore dismiss the Petition without prejudice.²

17
18 IT IS SO ORDERED.

19 Dated: July 14, 2009

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

20
21 ²Petitioner is informed that a dismissal for failure to exhaust will not bar him from returning to federal court after
22 exhausting his available state remedies. However, this does not mean that Petitioner will not be subject to the one year statute
23 of limitations imposed by 28 U.S.C. § 2244(d). Although the limitations period is tolled while a properly filed request for
collateral review is pending in state court, 28 U.S.C. § 2244(d)(2), it does not toll for the time an application is pending in
federal court. Duncan v. Walker, 531 U.S. 991 (2001). Petitioner is further informed that the Supreme Court has held:

24 [I]n the habeas corpus context it would be appropriate for an order dismissing a mixed
25 petition to instruct an applicant that upon his return to federal court he is to bring only
26 exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made
27 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).

28 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.