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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RICHARD SECRETAN,	)	1:08-cv-01059 OWW YNP (DLB) (HC)
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION
	)	REGARDING RESPONDENT’S MOTION
v.	)	TO DISMISS
	)	
	)	[Doc. #16]
WARDEN,	)	
	)	
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Petitioner’s parole was revoked at a parole revocation hearing on April 10, 2008. (Pet. at 1; Mot. to Dismiss at 2). On June 25, 2008, Petitioner filed the instant petition in Federal Court, claiming that his Sixth Amendment rights had been violated because he was not allowed to present his witness at the hearing. (Doc. #1). On September 17, 2008, Respondent filed a motion to dismiss the petition due to Petitioner’s failure to exhaust his claims in state court. (Doc. #16). On December 22, 2008, Petitioner filed a document entitled “Denial and Exception to the Return and Memorandum of Points and Authorities in Support Thereof.” (Doc. #25). The Court construes this document to be a response to Respondent’s motion to dismiss. On February 10, 2009, Respondent filed a reply to Petitioner’s response. It is Respondent’s motion to dismiss that will be considered herein.

**DISCUSSION**

A. Procedural Grounds for Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to

1 relief in the district court . . . .” The Advisory Committee Notes to Rule 5 of the Rules Governing §  
2 2254 Cases state that “an alleged failure to exhaust state remedies may be raised by the attorney  
3 general, thus avoiding the necessity of a formal answer as to that ground.” The Ninth Circuit has  
4 referred to a respondent’s motion to dismiss on the ground that the petitioner failed to exhaust state  
5 remedies as a request for the Court to dismiss under Rule 4 of the Rules Governing § 2254 Cases.  
6 See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9<sup>th</sup>  
7 Cir. 1989); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules  
8 Governing Section 2254 Cases and case law, the Court will review Respondent’s motion for  
9 dismissal pursuant to its authority under Rule 4.

#### 10 B. Exhaustion of State Remedies

11 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
12 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
13 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
14 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
15 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,  
16 1163 (9<sup>th</sup> Cir. 1988).

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

24 Additionally, the petitioner must have specifically told the state court that he was raising a  
25 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669  
26 (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);  
27 Keating v. Hood, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir.1998). In Duncan, the United States Supreme Court  
28 reiterated the rule as follows:

1 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion  
2 of state remedies requires that petitioners "fairly present" federal claims to the  
3 state courts in order to give the State the "opportunity to pass upon and correct  
4 alleged violations of the prisoners' federal rights" (some internal quotation marks  
5 omitted). If state courts are to be given the opportunity to correct alleged violations  
6 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners  
7 are asserting claims under the United States Constitution. If a habeas petitioner  
8 wishes to claim that an evidentiary ruling at a state court trial denied him the due  
9 process of law guaranteed by the Fourteenth Amendment, he must say so, not only  
10 in federal court, but in state court.

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

12 Our rule is that a state prisoner has not "fairly presented" (and thus  
13 exhausted) his federal claims in state court *unless he specifically indicated to  
14 that court that those claims were based on federal law*. See Shumway v. Payne,  
15 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in  
16 Duncan, this court has held that the *petitioner must make the federal basis of the  
17 claim explicit either by citing federal law or the decisions of federal courts, even  
18 if the federal basis is "self-evident," Gatlin v. Madding*, 189 F.3d 882, 889  
19 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
20 underlying claim would be decided under state law on the same considerations  
21 that would control resolution of the claim on federal grounds. Hiiivala v. Wood,  
22 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
23 (9th Cir. 1996); . . . .

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

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

Respondent prays for dismissal of this petition because Petitioner failed to bring his claims  
before the state court. In his response to the motion to dismiss, Petitioner denies the allegations that  
he has failed to exhaust his state court remedies but does not offer any proof that he ever filed a  
petition in state court nor gives any explanation as to why he has not filed in state court. (Resp. at 2).  
Furthermore, as Respondent points out, Petitioner filed his federal petition a mere three months after  
his parole was revoked; such a short time period hardly seems adequate to fully exhaust the state  
appeals process. (Mot. to Dismiss at 2). Because Petitioner did not give the highest court in the state  
a full and fair opportunity to decide or pass on the constitutional issues alleged, his petition should be  
dismissed.

### RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be  
GRANTED.

1 This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United  
2 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule  
3 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of  
4 California. Within thirty (30) days after being served with a copy of this Findings and  
5 Recommendation, any party may file written objections with the Court and serve a copy on all  
6 parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
7 Recommendation.” Replies to the Objections shall be served and filed within ten (10) court days  
8 (plus three days if served by mail) after service of the Objections. The Finding and Recommendation  
9 will then be submitted to the District Court for review of the Magistrate Judge’s ruling pursuant to  
10 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified  
11 time may waive the right to appeal the Order of the District Court. MartineYlst, 951 F.2d 1153 (9th  
12 Cir. 1991).

13 IT IS SO ORDERED.

14 **Dated: August 31, 2009**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE