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10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 MARCOS VALDEZ MORAN,) 1:08-cv-01788-BAK-SMS HC
13)
14 Petitioner,) ORDER DISMISSING PETITION FOR WRIT
15) OF HABEAS CORPUS AS UNEXHAUSTED
16 v.) (Doc. 2)
17 KEN CLARK, Warden, SATF-CSP,) ORDER DIRECTING CLERK OF COURT
18) TO ENTER JUDGMENT AND CLOSE FILE
19 Respondent.)
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21 _____ Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ
22 of habeas corpus pursuant to 28 U.S.C. § 2254. On December 19, 2008, Petitioner filed his written
23 consent to the jurisdiction of the United States Magistrate Judge for all purposes in these
24 proceedings. (Doc. 7). On March 19, 2009, after conducting its preliminary screening of the
25 petition, the Court issued an Order to Show Cause requiring Petitioner to show cause within thirty
26 days why the petition should not be dismissed as entirely unexhausted. (Doc. 8). To date, Petitioner
27 has not responded to the Court's Order to Show Cause.
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DISCUSSION

A. Preliminary Review of Petition

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
5 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section
6 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition
7 for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s
8 motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039
9 (9th Cir.2001).

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 (9th 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 (9th 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 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.
27 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
28 Supreme Court reiterated the rule as follows:

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

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

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

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

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

25 In his petition, Petitioner asserts the following grounds for relief: (1) ineffective assistance of
26 trial counsel; (2) denial of Petitioner’s right to due process because insufficient evidence supports the
27 conviction; and (3) ineffective assistance of appellate counsel. (Doc. 2). Petitioner alleges that he
28 filed a direct appeal in the California Court of Appeal, Fifth Appellate District, and that he also filed
29 a Petition for Review in the California Supreme Court. (Doc. 2, p. 8). However, with regard to the
30 latter, Petitioner alleges that it “raised a single issue not advanced herein....” (Id.). Petitioner never
31 alleges that he ever filed any petitions for writ of habeas corpus in the state courts containing the
32 claims in the instant petition or that he has ever presented the three claims contained in the instant
33 petition to the California Supreme Court.¹

34 From the foregoing, the Court concludes that none of the claims in the instant petition were
35 ever presented to the California Supreme Court. Since Petitioner has not presented his claims for
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37 ¹The Court notes that the petition references various documents, denominated Exhibits A and B, that are not in fact
38 filed with the Court or otherwise attached to the petition.

1 federal relief to the California Supreme Court, the Court must dismiss the petition. See Calderon v.
2 United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc); Greenawalt v. Stewart, 105
3 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition that is entirely unexhausted.
4 Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Calderon, 107 F.3d at 760.

5 **ORDER**

6 Accordingly, IT IS HEREBY ORDERED as follows:

7 1. The petition for writ of habeas corpus (Doc. 2), is DISMISSED as unexhausted; and
8 2. The Clerk of the Court is DIRECTED to enter judgment and close the file.

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10 IT IS SO ORDERED.

11 **Dated: July 2, 2009**

12 /s/ Sandra M. Snyder
13 UNITED STATES MAGISTRATE JUDGE

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