

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KENYATTA THURSTON,

Petitioner,

v.

DARREL G. ADAMS, Warden,

Respondents.

1:09-CV-00672 AWI MJS HC

ORDER TO SHOW CAUSE WHY THE  
PETITION SHOULD NOT BE DISMISSED  
FOR PETITIONER'S FAILURE TO  
EXHAUST STATE REMEDIES

\_\_\_\_ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition raises multiple claims challenging his 2005 conviction in the Kings County Superior Court for which he is serving a sentence of eight years in state prison.

**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

1 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
2 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
3 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,  
4 1163 (9th Cir. 1988).

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

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

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

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

28 Our rule is that a state prisoner has not "fairly presented" (and thus  
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,

1 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
2 (9th Cir. 1996); . . . .

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

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

8 Upon review of the instant petition for writ of habeas corpus, it appears that Petitioner has  
9 not presented his claims to the California Supreme Court. If Petitioner has not presented all of his  
10 claims to the California Supreme Court, the Court cannot proceed to the merits of those claims. 28  
11 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner has presented his claims to the California  
12 Supreme Court and simply neglected to inform this Court. Thus, Petitioner must inform the Court if  
13 his claims have been presented to the California Supreme Court, and if possible, provide the Court  
14 with a copy of the petition filed in the California Supreme Court, along with a copy of any ruling  
15 made by the California Supreme Court. Without knowing what claims have been presented to the  
16 California Supreme Court, the Court is unable to proceed to the merits of the petition.

### 17 ORDER

18 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why the petition should not be  
19 dismissed for Petitioner's failure to exhaust state remedies. Petitioner is ORDERED to inform the  
20 Court what claims have been presented to the California Supreme Court within thirty (30) days of  
21 the date of service of this order.

22 Petitioner is forewarned that failure to follow this order will result in dismissal of the petition  
23 pursuant to Local Rule 110.

24 IT IS SO ORDERED.

25 **Dated: April 29, 2010**

26 **/s/ Michael J. Seng**  
27 UNITED STATES MAGISTRATE JUDGE  
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