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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

TERRY MYERS,

1:09-cv-01565-SMS (HC)

Petitioner,

ORDER TO SHOW CAUSE WHY PETITION  
SHOULD NOT BE DISMISSED FOR LACK  
OF JURISDICTION

v.

[Doc. 1]

J. HARTLEY, 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.

On September 4, 2009, Petitioner filed the instant federal petition for writ of habeas corpus. The petition challenges the Board of Parole Hearings' 2006 finding that he is unsuitable for release on parole.

**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.

1 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
2 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
3 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
4 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
5 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d  
6 1158, 1163 (9<sup>th</sup> Cir. 1988).

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

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

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

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

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 (9<sup>th</sup> 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*

1 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889  
2 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
3 underlying claim would be decided under state law on the same considerations  
4 that would control resolution of the claim on federal grounds. Hiivala v. Wood,  
5 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
6 (9th Cir. 1996); . . . .

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

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

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

22 **ORDER**

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

27 Petitioner is forewarned that failure to follow this order will result in dismissal of the  
28 petition pursuant to Local Rule 11-110.

IT IS SO ORDERED.

Dated: September 15, 2009

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE