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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 ROBERT MCDANIEL,) 1:09-cv-01809 AWI MJS HC
12 Petitioner,)
13) ORDER TO SHOW CAUSE WHY THE
14 v.) PETITION SHOULD NOT BE DISMISSED
15 I.D. CLAY, Warden,) FOR PETITIONER'S FAILURE TO
16 Respondents.) EXHAUST STATE REMEDIES
17

18 _____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
19 pursuant to 28 U.S.C. § 2254. The petition raises claims challenging a November 21, 2008
20 disciplinary hearing in which Petitioner lost 150 days of credits. (Court Doc. 1, p. 1.)

21 **DISCUSSION**

22 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review
23 of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears
24 from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing §
25 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). Otherwise, the Court will order
26 Respondent to respond to the petition. Rule 5 of the Rules Governing § 2254 Cases.

27 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
28 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:
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29 Our rule is that a state prisoner has not "fairly presented" (and thus
30 exhausted) his federal claims in state court *unless he specifically indicated to*
31 *that court that those claims were based on federal law*. See Shumway v. Payne,
32 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
33 Duncan, this court has held that the *petitioner must make the federal basis of the*
34 *claim explicit either by citing federal law or the decisions of federal courts, even*
35 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
36 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
37 underlying claim would be decided under state law on the same considerations
38 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 From review of the instant petition for writ of habeas corpus, it does not appear that
9 Petitioner has presented his claims to the California Supreme Court. If Petitioner has not presented
10 his claims to the California Supreme Court, this Court cannot proceed to address the merits of those
11 claims. 28 U.S.C. § 2254(b)(1). If Petitioner has presented his claims to the California Supreme
12 Court and simply neglected to inform this Court, he must so advise the Court and, if possible,
13 provide a copy of the petition filed in the California Supreme Court and a copy of any ruling thereon
14 by the California Supreme Court.

15 **ORDER**

16 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why his petition should not be
17 dismissed for failure to exhaust state remedies, and he is ORDERED further to inform this Court as
18 to what if any claims have been presented to and addressed by the California Supreme Court .

19 Petitioner is forewarned that **failure to comply with this order within thirty (30) days** of
20 the date of its service upon him **will result in dismissal of his petition** pursuant to Local Rule 110.

21 IT IS SO ORDERED.

22 Dated: May 27, 2010

23 /s/ Michael J. Leng
24 UNITED STATES MAGISTRATE JUDGE
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