

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STEPHEN GARCIA,

1:10-cv-00485-DLB (HC)

Petitioner,

ORDER DISMISSING PETITION FOR WRIT
OF HABEAS CORPUS, DIRECTING CLERK
OF COURT TO TERMINATE ACTION, AND
DECLINING TO ISSUE CERTIFICATE OF
APPEALABILITY

FRESNO POLICE DEPARTMENT,

[Doc. 1]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b). (Court Doc. 3.)

Petitioner filed the instant petition on March 18, 2010. Petitioner claims that he was falsely arrested and convicted of assault, resisting arrest, and violent threats on December 12, 2008.

DISCUSSION

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” The Advisory Committee Notes to Rule 5 of the Rules Governing Section 2254 Cases state that “an alleged failure to exhaust state remedies may be raised by the attorney general, thus avoiding the necessity of a formal answer as to that ground.”

1 B. Exhaustion of State Remedies

2 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
3 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
4 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
5 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
6 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.
7 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

8 A petitioner can satisfy the exhaustion requirement by providing the highest state court
9 with a full and fair opportunity to consider each claim before presenting it to the federal court.
10 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,
11 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair
12 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
13 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal
14 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).
15 Additionally, the petitioner must have specifically told the state court that he was raising a
16 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133
17 F.3d 1240, 1241 (9th Cir. 1998). For example, if a petitioner wishes to claim that the trial court
18 violated his due process rights "he must say so, not only in federal court but in state court."
19 Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general appeal to a constitutional guarantee is
20 insufficient to present the "substance" of such a federal claim to a state court. See Anderson v.
21 Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982) (Exhaustion requirement not satisfied circumstance
22 that the "due process ramifications" of an argument might be "self-evident."); Gray v.
23 Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 1074 (1996) ("a claim for relief in habeas corpus
24 must include reference to a specific federal constitutional guarantee, as well as a statement of the
25 facts which entitle the petitioner to relief.").

26 Additionally, the petitioner must have specifically told the state court that he was raising
27 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
28 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th

1 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
2 Supreme Court reiterated the rule as follows:

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

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

14 Our rule is that a state prisoner has not "fairly presented" (and thus
15 exhausted) his federal claims in state court *unless he specifically indicated to*
16 *that court that those claims were based on federal law*. See Shumway v. Payne,
17 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
18 Duncan, this court has held that the *petitioner must make the federal basis of the*
19 *claim explicit either by citing federal law or the decisions of federal courts, even*
20 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
21 (9th Cir. 1999) (*citing Anderson v. Harless*, 459 U.S. 4, 7 . . . (1982)), or the
22 underlying claim would be decided under state law on the same considerations
23 that would control resolution of the claim on federal grounds. Hiivala v. Wood,
24 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
25 (9th Cir. 1996); . . .

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

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

30 On the form petition, Petitioner indicates that he has not sought review in the state courts.
31 (Petition, at 5.) The Court cannot consider a petition that contains completely unexhausted
32 claims. Rose v. Lundy, 455 U.S. 509, 521-522 (1982). Therefore, the instant petition must be
33 dismissed without prejudice for lack of exhaustion.

34 Furthermore, the Court declines to issue a certificate of appealability. a state prisoner
35 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of
36 his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537
37 U.S. 322, 335-336 (2003). The controlling statute, 28 U.S.C. § 2253, provides as follows:

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Accordingly, final orders issued by a federal district court in habeas corpus proceedings are reviewable by the circuit court of appeals, and, in order to have final orders reviewed, a petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253. This Court will issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Accordingly, the Court DECLINES to issue a certificate of appealability.

ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. The instant petition for writ of habeas corpus is DISMISSED without prejudice for lack of exhaustion;

1 2. The Clerk of Court is directed to terminate this action; and,
2 3. The Court declines to issue a Certificate of Appealability.

3

4 IT IS SO ORDERED.

5 Dated: April 8, 2010

5 _____
6 /s/ **Dennis L. Beck**
7 UNITED STATES MAGISTRATE JUDGE