

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEPHEN GARCIA,
Petitioner,
v.
COJO MOORE & ASSOC.,
Respondent.

1:10-cv-00489 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 various claims challenging a December 12, 2008, conviction of the Fresno County Superior Court. (Pet. 2, ECF No. 1.)

I. 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
2 by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. §
3 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state
4 court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman
5 v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo
6 v. Sunn, 854 F.2d 1158, 1163 (9th 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 (9th 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
12 the highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal
13 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9 (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 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
17 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th 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
20 exhaustion of state remedies requires that petitioners "fairly
21 present" federal claims to the state courts in order to give the
22 State the "'opportunity to pass upon and correct' alleged violations
23 of the prisoners' federal rights" (some internal quotation marks
24 omitted). If state courts are to be given the opportunity to correct
25 alleged violations of prisoners' federal rights, they must surely be
26 alerted to the fact that the prisoners are asserting claims under the
27 United States Constitution. If a habeas petitioner wishes to claim
28 that an evidentiary ruling at a state court trial denied him the due
process of law guaranteed by the Fourteenth Amendment, he
must say so, not only 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 (9th

1 Cir. 2000). Since the Supreme Court's decision in Duncan, this
2 court has held that the *petitioner must make the federal basis of*
3 *the claim explicit either by citing federal law or the decisions of*
4 *federal courts, even if the federal basis is "self-evident,"* Gatlin v.
5 Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
6 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
7 decided under state law on the same considerations that would
8 control resolution of the claim on federal grounds. Hiivala v. Wood,
9 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88
10 F.3d 828, 830-31 (9th Cir. 1996);

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

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

16 Upon review of the instant petition for writ of habeas corpus, it appears that Petitioner
17 has not presented his claims to the California Supreme Court. Accordingly, this Court cannot
18 determine if any of his claims have been exhausted. If Petitioner has not presented his claims
19 to the California Supreme Court, the Court cannot proceed to the merits of those claims. 28
20 U.S.C. § 2254(b)(1).

21 It is possible that Petitioner has presented his claims to the California Supreme Court
22 and simply neglected to inform this Court. Petitioner will be given a further opportunity to, and
23 will be ordered to, inform the Court if his claims have been presented to the California
24 Supreme Court, and if possible, provide the Court with a copy of the petition filed in the
25 California Supreme Court and a copy of any ruling made by the California Supreme Court.

26 **II. ORDER**

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

///

///

///

Petitioner is forewarned that failure to follow this order will result in dismissal of the

1 Petition pursuant to Local Rule 110.
2
3

4 IT IS SO ORDERED.

5 Dated: July 16, 2010 /s/ Michael J. Seng
6 UNITED STATES MAGISTRATE JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28