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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STEPHEN GARCIA,	)	1:10-CV-00555 GSA HC
	)	
Petitioner,	)	ORDER DISMISSING PETITION FOR WRIT
	)	OF HABEAS CORPUS
	)	
v.	)	ORDER DIRECTING CLERK OF COURT
	)	TO ENTER JUDGMENT AND CLOSE CASE
	)	
DISTRICT ATTORNEY OFFICE,	)	ORDER DECLINING ISSUANCE OF
	)	CERTIFICATE OF APPEALABILITY
Respondent.	)	
_____	)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has returned his consent/decline form indicating consent to Magistrate Judge jurisdiction.

On December 12, 2008, Petitioner was convicted in the Fresno County Superior Court of assault and battery on a peace officer. See Petition at 2. He was sentenced to time served plus two years of felony probation. Id. He is now in custody for violating probation. Id. On March 31, 2010, Petitioner filed the instant federal petition for writ of habeas corpus.

**DISCUSSION**

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

1 If it plainly appears from the petition and any attached exhibits that the petitioner is not  
2 entitled to relief in the district court, the judge must dismiss the petition and direct the clerk  
to notify the petitioner.

3 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
4 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to  
5 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup>  
6 Cir.2001).

7 A petitioner who is in state custody and wishes to collaterally challenge a conviction by a  
8 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
9 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
10 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
11 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198,  
12 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9<sup>th</sup> Cir. 1988).

13 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
14 full and fair opportunity to consider each claim before presenting it to the federal court. Picard v.  
15 Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9<sup>th</sup> Cir.  
16 1996). A federal court will find that the highest state court was given a full and fair opportunity to  
17 hear a claim if the petitioner has presented the highest state court with the claim's factual and legal  
18 basis. Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S.  
19 1 (1992) (factual basis).

20 Additionally, the petitioner must have specifically told the state court that he was raising a  
21 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669  
22 (9<sup>th</sup> Cir.2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.1999);  
23 Keating v. Hood, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir.1998). In Duncan, the United States Supreme Court  
24 reiterated the rule as follows:

25 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion  
26 of state remedies requires that petitioners "fairly present" federal claims to the  
27 state courts in order to give the State the "opportunity to pass upon and correct  
28 alleged violations of the prisoners' federal rights" (some internal quotation marks  
omitted). If state courts are to be given the opportunity to correct alleged violations  
of prisoners' federal rights, they must surely be alerted to the fact that the prisoners  
are asserting claims under the United States Constitution. If a habeas petitioner

1 wishes to claim that an evidentiary ruling at a state court trial denied him the due  
2 process of law guaranteed by the Fourteenth Amendment, he must say so, not only  
in federal court, but in state court.

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

4 Our rule is that a state prisoner has not "fairly presented" (and thus  
5 exhausted) his federal claims in state court *unless he specifically indicated to*  
6 *that court that those claims were based on federal law.* See Shumway v. Payne,  
7 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in  
8 Duncan, this court has held that the *petitioner must make the federal basis of the*  
9 *claim explicit either by citing federal law or the decisions of federal courts, even*  
10 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889  
11 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
12 underlying claim would be decided under state law on the same considerations  
13 that would control resolution of the claim on federal grounds. Hiiivala v. Wood,  
14 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
15 (9th Cir. 1996); . . . .

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

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

21 In this case, Petitioner states he has not sought relief in the California Supreme Court. Thus,  
22 the instant petition is unexhausted and must be dismissed. 28 U.S.C. § 2254(b)(1).

### 23 **CERTIFICATE OF APPEALABILITY**

24 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
25 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
26 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue  
27 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

28 (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

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(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).

If a court denies a petitioner’s petition, the court may only issue a certificate of appealability “if jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate “something more than the absence of frivolity or the existence of mere good faith on his . . . part.” Miller-El, 123 S.Ct. at 1040.

In the present case, the Court finds that 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. Petitioner has not made the required substantial showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to issue a certificate of appealability.

**ORDER**

Accordingly, IT IS HEREBY ORDERED:

- 1) The petition for writ of habeas corpus is **DISMISSED** without prejudice;<sup>1</sup>
- 2) The Clerk of Court is **DIRECTED** to enter judgment and close the case; and

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<sup>1</sup>A dismissal for failure to exhaust is not a dismissal on the merits, and Petitioner will not be barred from returning to federal court after Petitioner exhausts available state remedies by 28 U.S.C. § 2244 (b)’s prohibition on filing second petitions. See In re Turner, 101 F.3d 1323 (9<sup>th</sup> Cir. 1996). However, the Supreme Court has held that:

[I]n the habeas corpus context it would be appropriate for an order dismissing a mixed petition to instruct an applicant that upon his return to federal court he is to bring only exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made aware of the exhaustion requirement, no reason exists for him not to exhaust all potential claims before returning to federal court. The failure to comply with an order of the court is grounds for dismissal with prejudice. Fed. Rules Civ. Proc. 41(b).

Slack v. McDaniel, 529 U.S. 473, 489 (2000). Therefore, Petitioner is forewarned that in the event he returns to federal court and files a mixed petition of exhausted and unexhausted claims, the petition may be dismissed with prejudice.

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3) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

**Dated: April 21, 2010**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE