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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PERCY STOCKTON,)	1:10-cv-00586-JLT HC
)	
Petitioner,)	ORDER TO SHOW CAUSE WHY THE
v.)	PETITION SHOULD NOT BE DISMISSED AS
)	CONTAINING UNEXHAUSTED CLAIMS
)	ORDER DIRECTING PETITIONER TO FILE A
T. BILLINGS,)	RESPONSE WITHIN THIRTY DAYS
)	
Respondent.)	

PROCEDURAL HISTORY

Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

The instant petition, which concerns a disciplinary hearing held on October 10, 2009, was filed on April 5, 2010. (Doc. 1). In the petition, Petitioner alleges a single ground for relief as follows: (1) a prison counselor, T. Billings, repeatedly rejected Petitioner’s appeal from a disciplinary rules violation finding that resulted, inter alia, in the loss of thirty days’ credits. (Doc. 1, pp. 3; 19). On April 16, 2010, Petitioner filed his written consent to the jurisdiction of the United States Magistrate Judge for all purposes. (Doc. 4).

A preliminary review of the Petition, however, reveals that some or all of Petitioner’s claims may be unexhausted.

1 **DISCUSSION**

2 A. Preliminary Review of Petition.

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
5 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section
6 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a
7 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the
8 respondent’s motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook,
9 260 F.3d 1039 (9th Cir.2001).

10 B. Exhaustion.

11 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
12 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
13 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
14 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
15 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d
16 1158, 1163 (9th Cir. 1988).

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

24 Additionally, the petitioner must have specifically told the state court that he was raising
25 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
26 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th
27 Cir. 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
28 Supreme Court reiterated the rule as follows:

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

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

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

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

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

28 In this case, Petitioner does not indicate that he has ever presented his claim to the
California Supreme Court. Instead, he states, “I have other pending suits, both civil and habeas
corpus.” (Doc. 1, p. 6). However, Petitioner does not identify the courts in which those cases
were filed, the dates on which they were filed, or the issues raised in those cases. Certainly,
Petitioner does not allege that he has presented his claim of wrongful rejection of his disciplinary
appeal to the State’s highest court. Accordingly, at this juncture, it appears that the petition
contains only unexhausted claims.

The Court must dismiss a petition that contains unexhausted claims, even if it also
contains exhausted claims. Rose, 455 U.S. at 521-22, 102 S.Ct. at 1205; Calderon v. United
States Dist. Court (Gordon), 107 F.3d 756, 760 (9th Cir. 1997) (en banc) *cert. denied*, 118 S.Ct.
265 (1997).

1 Petitioner will be ordered to show cause why the Petition should not be dismissed for
2 failing to exhaust state court remedies. *Should it be the case that the claims were exhausted,*
3 *Petitioner should make clear when and in what court the claims were raised.* If possible,
4 Petitioner should present to the Court documentary evidence that the claims were indeed
5 presented to the California Supreme Court.¹

6 If the Petition contains unexhausted claims, Petitioner may, at his option, withdraw the
7 unexhausted claims and go forward with the exhausted claims. Anthony v. Cambra, 236 F.3d
8 568, 574 (9th Cir.2000) (“habeas litigants must have opportunity to amend their mixed petitions
9 by striking unexhausted claims as an alternative to suffering dismissal”).

10 Petitioner may also move to withdraw the entire Petition and return to federal court only
11 when he has finally exhausted his state court remedies. Petitioner should bear in mind, however,
12 that there exists a one year statute of limitations applicable to federal habeas corpus petitions. 28
13 U.S.C. § 2244(d)(1); Ford, 305 F.3d at 885-885. In most cases, the one year period starts to run
14 on the date the California Supreme Court denied Petitioner’s direct review. See id. Although the
15 limitations period tolls while a properly filed request for collateral review is pending in state
16 court, 28 U.S.C. § 2244(d)(2), it *does not* toll for the time an application is pending in federal
17 court. Duncan v. Walker, 531 U.S. 991 (2001).

18 Finally, Petitioner can do nothing, and thereby risk dismissal of the entire Petition should
19 the Court later find that the Petition contained unexhausted claims.

20 **ORDER TO SHOW CAUSE**

21 Accordingly, the Court HEREBY ORDERS:

- 22 1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of
23 service of this Order why the Petition should not be dismissed for failing to
24 exhaust state court remedies.

25 Petitioner is forewarned that his failure to comply with this order may result in an order
26

27 ¹A copy of the California Supreme Court’s denial alone is insufficient to demonstrate exhaustion. The
28 proper documentation to provide would be a copy of the Petition *filed* in the California Supreme Court that includes
the claim now presented and a file stamp showing that it was indeed filed in that Court.

1 that the Petition be dismissed pursuant to Local Rule 110.

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3 IT IS SO ORDERED.

4 Dated: April 26, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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