



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 which, if any, of his claims have been exhausted. If Petitioner has not presented  
19 his claims to the California Supreme Court, the Court cannot proceed to the merits of those  
20 claims. 28 U.S.C. § 2254(b)(1).

21 It is possible, however, that Petitioner has presented his claims to the California  
22 Supreme Court and simply neglected to inform this Court. Thus, Petitioner must inform the  
23 Court if his claims have been presented to the California Supreme Court, and, if possible,  
24 provide the Court with a copy of the petition filed in the California Supreme Court, along with  
25 a copy of any ruling made by the California Supreme Court. Without knowing what claims  
26 have been presented to the California Supreme Court, the Court is unable to proceed to the  
27 merits of the petition.

28 Further, the proof of service attached to the petition indicates Petitioner addressed his  
petition to the California Court of Appeals, Fifth District Court of Appeals but used the physical  
address for the United States District Court, Eastern District of California, Fresno Division. If  
Petitioner intended to file the petition with the California Court of Appeals, it is not likely that  
the petition was received by the Court of Appeals.

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1 **II. ORDER**

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

6 Petitioner is forewarned that failure to follow this order will result in dismissal of the  
7 petition pursuant to Local Rule 110.

8 IT IS SO ORDERED.

9 Dated: August 21, 2010

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE

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