

1 petition in the Los Angeles County Superior Court. The petition was denied in a reasoned decision
2 on December 28, 2009. He then filed a habeas petition in the California Court of Appeal, Second
3 Appellate District, on January 19, 2010. The petition was denied in a reasoned decision on
4 March 12, 2010. Petitioner then filed a habeas petition in the California Supreme Court on April 9,
5 2010. The petition was summarily denied on June 9, 2010.

6 On June 23, 2010, Petitioner filed the instant petition for writ of habeas corpus. He claims
7 the state court adjudicated his claims concerning his parole hearing in violation of federal law. On
8 September 17, 2010, Respondent filed a motion to dismiss the petition for failure to exhaust state
9 remedies. On October 12, 2010, Petitioner filed an opposition to Respondent's motion to dismiss.

10 **DISCUSSION**

11 A. Procedural Grounds for Motion to Dismiss

12 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
13 petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not
14 entitled to relief in the district court" The Advisory Committee Notes to Rule 5 of the Rules
15 Governing § 2254 Cases state that "an alleged failure to exhaust state remedies may be raised by the
16 attorney general, thus avoiding the necessity of a formal answer as to that ground." The Ninth
17 Circuit has referred to a respondent's motion to dismiss on the ground that the petitioner failed to
18 exhaust state remedies as a request for the Court to dismiss under Rule 4 of the Rules Governing
19 § 2254 Cases. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d
20 599, 602-03 (9th Cir. 1989); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982).
21 Based on the Rules Governing Section 2254 Cases and case law, the Court will review Respondent's
22 motion for dismissal pursuant to its authority under Rule 4.

23 B. Exhaustion of State Remedies

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

1 1163 (9th Cir. 1988).

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

9 Additionally, the petitioner must have specifically told the state court that he was raising a
10 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
11 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999);
12 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States Supreme Court
13 reiterated the rule as follows:

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

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

25 Our rule is that a state prisoner has not "fairly presented" (and thus
26 exhausted) his federal claims in state court *unless he specifically indicated to*
27 *that court that those claims were based on federal law.* See Shumway v. Payne,
28 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
Duncan, this court has held that the *petitioner must make the federal basis of the*
claim explicit either by citing federal law or the decisions of federal courts, even
if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889
(9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
underlying claim would be decided under state law on the same considerations
that would control resolution of the claim on federal grounds. Hiivala v. Wood,
195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
(9th Cir. 1996);

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

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

2 Respondent contends Petitioner has failed to exhaust his state remedies because Petitioner
3 did not present a federal basis for his claims to the state courts. Respondent’s arguments are
4 persuasive. The Court has reviewed the petition presented to the California Supreme Court.
5 Petitioner’s claims were entirely based on a violation of state law. Petitioner did not claim a
6 violation of federal law or cite any federal authorities in support of his claims. Accordingly, the
7 instant petition is unexhausted and must be dismissed. 28 U.S.C. § 2254(b)(1).

8 **RECOMMENDATION**

9 Accordingly, the Court RECOMMENDS that Respondent’s motion to dismiss be
10 GRANTED and the petition for writ of habeas corpus be DISMISSED without prejudice.² This
11 Findings and Recommendation is submitted to the United States District Court Judge assigned to the
12 case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of
13 Practice for the United States District Court, Eastern District of California.

14 Within thirty (30) days after date of service of this Findings and Recommendation, any party
15 may file written objections with the Court and serve a copy on all parties. Such a document should
16 be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
17 Objections shall be served and filed within fourteen (14) days after date of service of the Objections.
18 The Finding and Recommendation will then be submitted to the District Court for review of the
19 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure
20 to file objections within the specified time may waive the right to appeal the Order of the District

21 _____
22 ²A dismissal for failure to exhaust is not a dismissal on the merits, and Petitioner will not be barred from returning
23 to federal court after Petitioner exhausts available state remedies by 28 U.S.C. § 2244 (b)’s prohibition on filing second
24 petitions. See In re Turner, 101 F.3d 1323 (9th Cir. 1996). However, the Supreme Court has held that:

25 [I]n the habeas corpus context it would be appropriate for an order dismissing a mixed
26 petition to instruct an applicant that upon his return to federal court he is to bring only
27 exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made
28 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).

28 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.

1 Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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3 IT IS SO ORDERED.

4 **Dated:** November 2, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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