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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANITA LOPEZ,)	Case No.: 1:10-cv-01265-OWW-JLT HC
)	
Petitioner,)	ORDER TO SHOW CAUSE WHY THE
)	PETITION SHOULD NOT BE DISMISSED AS
v.)	CONTAINING UNEXHAUSTED CLAIMS
)	
)	ORDER DIRECTING PETITIONER TO FILE A
COURT OF APPEALS,)	RESPONSE WITHIN THIRTY DAYS
)	
Respondent.)	
)	

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 was filed on July 15, 2010. (Doc. 1). In the petition, Petitioner alleges as follows: (1) pursuant to Cunningham v. California, Petitioner’s sentence to the upper term is illegal; and, (2) Petitioner has been subjected to an illegal double enhancement where she was sentenced to the upper term, that upper term was doubled under California’s Two Strikes Law, and then additional enhancements were added for the same prior convictions used under the Two Strikes Law. A preliminary review of the Petition, however, indicates that Petitioner’s claims may be unexhausted.

A. Preliminary Review of Petition.

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a

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

7 B. Exhaustion.

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

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

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

26 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
27 remedies requires that petitioners “fairly presen[t]” federal claims to the state courts in
28 order to give the State the “opportunity to pass upon and correct 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

1 surely be alerted to the fact that the prisoners are asserting claims under the United States
2 Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state
3 court trial denied him the due process of law guaranteed by the Fourteenth Amendment,
4 he must say so, not only in federal court, but in state court.

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

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

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

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

14 In this case, Petitioner alleges that she filed one state habeas petition in the Kern County
15 Superior Court that was denied on June 28, 2010, approximately ten days before Petitioner
16 signed the instant petition and approximately seventeen days before it was filed. In the form
17 petition, Petitioner indicates that she has no other state habeas petitions pending at the time of
18 filing. Accordingly, it does not appear to the Court that Petitioner has attempted to exhaust either
19 of her claims beyond the Superior Court level. Certainly, it does not appear that Petitioner has
20 presented her claims to the California Supreme Court.

21 The Court must dismiss a petition that contains unexhausted claims, even if it also
22 contains exhausted claims. Rose, 455 U.S. at 521-22, 102 S.Ct. at 1205; Calderon v. United
23 States Dist. Court (Gordon), 107 F.3d 756, 760 (9th Cir. 1997) (en banc) *cert. denied*, 118 S.Ct.
24 265 (1997).

25 Petitioner will be ordered to show cause why the Petition should not be dismissed for
26 failing to exhaust state court remedies. Should it be the case that the claims were exhausted,
27 Petitioner should make clear when and in what court the claims were raised. If possible,
28 Petitioner should present to the Court documentary evidence that the claims were indeed

1 presented to the California Supreme Court.¹

2 If the Petition contains unexhausted claims, Petitioner may, at her option, withdraw the
3 unexhausted claims and go forward with the exhausted claims. Anthony v. Cambra, 236 F.3d
4 568, 574 (9th Cir.2000) (“habeas litigants must have opportunity to amend their mixed petitions
5 by striking unexhausted claims as an alternative to suffering dismissal”). Petitioner may also
6 move to withdraw the entire Petition and return to federal court only when he has finally
7 exhausted his state court remedies. Petitioner should bear in mind, however, that there exists a
8 one-year statute of limitations applicable to federal habeas corpus petitions. 28 U.S.C.
9 § 2244(d)(1); Ford, 305 F.3d at 885-885. In most cases, the one-year period starts to run on the
10 date the California Supreme Court denied Petitioner’s direct review. See id. Although the
11 limitations period tolls while a properly filed request for collateral review is pending in state
12 court, 28 U.S.C. § 2244(d)(2), it does not toll for the time an application is pending in federal
13 court. Duncan v. Walker, 531 U.S. 991 (2001).

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

16 Accordingly, the Court HEREBY ORDERS:

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

20 Petitioner is forewarned that his failure to comply with this order may result in a
21 Recommendation that the Petition be dismissed pursuant to Local Rule 110.

22
23 IT IS SO ORDERED.

24 Dated: July 30, 2010

25 /s/ Jennifer L. Thurston
26 UNITED STATES MAGISTRATE JUDGE

27
28 ¹A copy of the California Supreme Court’s denial alone is insufficient to demonstrate exhaustion. The 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.