

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

10 MATTHEW VINCENT SALINAS, ) 1:11-cv-00020-OWW-SMS-HC  
11 Petitioner, )  
12 ) ORDER TO PETITIONER TO SHOW CAUSE  
13 ) WITHIN THIRTY (30) DAYS WHY THE  
14 ) PETITION SHOULD NOT BE DISMISSED  
15 ) FOR FAILURE TO ALLEGGE EXHAUSTION  
v. ) OF STATE COURT REMEDIES  
MATTHEW CATE, )  
Respondent. )  
 )  
 )

17 Petitioner is a state prisoner proceeding pro and in forma  
18 pauperis with a petition for writ of habeas corpus pursuant to 28  
19 U.S.C. § 2254. The matter has been referred to the Magistrate  
20 Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and  
21 304. Pending before the Court is the petition, which was filed  
22 on January 6, 2011.<sup>1</sup>

## I. Screening the Petition

24 Rule 4 of the Rules Governing § 2254 Cases in the United  
25 States District Courts (Habeas Rules) requires the Court to make  
26 a preliminary review of each petition for writ of habeas corpus.

<sup>1</sup> The case was transferred on January 12, 2011, and was subsequently retransferred to this Court and reopened on March 3, 2011.

1 The Court must summarily dismiss a petition "[i]f it plainly  
2 appears from the petition and any attached exhibits that the  
3 petitioner is not entitled to relief in the district court...."  
4 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
5 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
6 1990). Habeas Rule 2(c) requires that a petition 1) specify all  
7 grounds of relief available to the Petitioner; 2) state the facts  
8 supporting each ground; and 3) state the relief requested.  
9 Notice pleading is not sufficient; rather, the petition must  
10 state facts that point to a real possibility of constitutional  
11 error. Rule 4, Advisory Committee Notes, 1976 Adoption;  
12 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
13 Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition  
14 that are vague, conclusory, or palpably incredible are subject to  
15 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th  
16 Cir. 1990).

17 Further, the Court may dismiss a petition for writ of habeas  
18 corpus either on its own motion under Habeas Rule 4, pursuant to  
19 the respondent's motion to dismiss, or after an answer to the  
20 petition has been filed. Advisory Committee Notes to Habeas Rule  
21 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
22 (9th Cir. 2001).

23       II. Background

24 Petitioner alleges that he is an inmate of La Palma  
25 Correctional Center in Eloy, Arizona, who is serving a  
26 determinate sentence of four years and four months for conviction  
27 in the Kern County Superior Court in 2008 of possession of a  
28 controlled substance for sale. (Pet. 2.) Petitioner challenges

1 the manner in which state authorities apply the state statutes  
2 concerning sentencing and parole to Petitioner, and he alleges  
3 that by imposing parole at the end of a fully served sentence,  
4 the authorities are actually extending his sentence in violation  
5 of several constitutional provisions. (Pet. 3-18.)

6        III. Exhaustion of State Court Remedies

7        A petitioner who is in state custody and wishes to challenge  
8 collaterally a conviction by a petition for writ of habeas corpus  
9 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  
11 gives the state court the initial opportunity to correct the  
12 state's alleged constitutional deprivations. Coleman v.  
13 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,  
14 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.  
15 1988).

16        A petitioner can satisfy the exhaustion requirement by  
17 providing the highest state court with the necessary jurisdiction  
18 a full and fair opportunity to consider each claim before  
19 presenting it to the federal court, and demonstrating that no  
20 state remedy remains available. Picard v. Connor, 404 U.S. 270,  
21 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.  
22 1996). A federal court will find that the highest state court  
23 was given a full and fair opportunity to hear a claim if the  
24 petitioner has presented the highest state court with the claim's  
25 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365  
26 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10  
27 (1992), superceded by statute as stated in Williams v. Taylor,  
28 529 U.S. 362 (2000) (factual basis).

1       Additionally, the petitioner must have specifically told the  
2 state court that he was raising a federal constitutional claim.  
3 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669  
4 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala  
5 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,  
6 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United  
7 States Supreme Court reiterated the rule as follows:

8       In Picard v. Connor, 404 U.S. 270, 275... (1971),  
9 we said that exhaustion of state remedies requires that  
10 petitioners "fairly presen[t]" federal claims to the  
state courts in order to give the State the  
11 "'opportunity to pass upon and correct' alleged  
violations of the prisoners' federal rights" (some  
12 internal quotation marks omitted). If state courts are  
to be given the opportunity to correct alleged violations  
13 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  
14 habeas petitioner wishes to claim that an evidentiary  
ruling at a state court trial denied him the due  
15 process of law guaranteed by the Fourteenth Amendment,  
he must say so, not only in federal court, but in state  
court.

16       Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule  
17 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.  
18 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th  
19 Cir. 2001), stating:

20       Our rule is that a state prisoner has not "fairly  
21 presented" (and thus exhausted) his federal claims  
in state court unless he specifically indicated to  
22 that court that those claims were based on federal law.  
See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.  
23 2000). Since the Supreme Court's decision in Duncan,  
this court has held that the petitioner must make the  
24 federal basis of the claim explicit either by citing  
federal law or the decisions of federal courts, even  
25 if the federal basis is "self-evident," Gatlin v. Madding,  
189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.  
26 Harless, 459 U.S. 4, 7... (1982)), or the underlying  
claim would be decided under state law on the same  
27 considerations that would control resolution of the claim  
on federal grounds, see, e.g., Hiivala v. Wood, 195  
28 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,

1 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d  
2 at 865.

3 ...  
4 In Johnson, we explained that the petitioner must alert  
5 the state court to the fact that the relevant claim is a  
6 federal one without regard to how similar the state and  
7 federal standards for reviewing the claim may be or how  
8 obvious the violation of federal law is.

9 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as  
10 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.  
11 2001).

12 Where none of a petitioner's claims has been presented to  
13 the highest state court as required by the exhaustion doctrine,  
14 the Court must dismiss the petition. Raspberry v. Garcia, 448  
15 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,  
16 481 (9th Cir. 2001). The authority of a court to hold a mixed  
17 petition in abeyance pending exhaustion of the unexhausted claims  
18 has not been extended to petitions that contain no exhausted  
19 claims. Raspberry, 448 F.3d at 1154.

20 Petitioner states that all administrative remedies with the  
21 California Department of Corrections have been exhausted. (Pet.  
22 13.) Petitioner also attaches to the petition a copy of a  
23 decision of the Kern County Superior Court denying habeas corpus  
24 relief. (Pet. 14-18.) However, Petitioner does not state that  
25 he has presented his claims to any other state court; he does not  
26 specifically describe any proceedings in the state courts except  
27 for the trial court decision.

28 Therefore, upon review of the instant petition for writ of  
29 habeas corpus, it appears that Petitioner has not presented his  
claims to the California Supreme Court. If Petitioner has not  
presented all of his claims to the California Supreme Court, the

Court cannot proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner has presented his claims to the California Supreme Court and simply neglected to inform this Court.

Thus, Petitioner must inform the Court if his claims have been presented to the California Supreme Court, and if possible, provide the Court with a copy of the petition filed in the California Supreme Court, along with a copy of any ruling made by the California Supreme Court. Without knowing what claims have been presented to the California Supreme Court, the Court is unable to proceed to the merits of the petition.

### III. Order to Show Cause

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

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

IT IS SO ORDERED.

Dated: March 3, 2011

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE