

1 should not be dismissed for Petitioner's failure to exhaust state
2 court remedies.

3 I. Screening the Petition

4 Rule 4 of the Rules Governing § 2254 Cases in the United
5 States District Courts (Habeas Rules) requires the Court to make
6 a preliminary review of each petition for writ of habeas corpus.
7 The Court must summarily dismiss a petition "[i]f it plainly
8 appears from the petition and any attached exhibits that the
9 petitioner is not entitled to relief in the district court...."
10 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
11 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
12 1990). Habeas Rule 2(c) requires that a petition 1) specify all
13 grounds of relief available to the Petitioner; 2) state the facts
14 supporting each ground; and 3) state the relief requested.
15 Notice pleading is not sufficient; rather, the petition must
16 state facts that point to a real possibility of constitutional
17 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
18 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
19 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
20 that are vague, conclusory, or palpably incredible are subject to
21 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
22 Cir. 1990).

23 Further, the Court may dismiss a petition for writ of habeas
24 corpus either on its own motion under Habeas Rule 4, pursuant to
25 the respondent's motion to dismiss, or after an answer to the
26 petition has been filed. Advisory Committee Notes to Habeas Rule
27 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
28 (9th Cir. 2001).

1 II. Discharge of the Order to Show Cause

2 Because on April 6, 2011, Petitioner responded to the order
3 to show cause, the order to show cause will be discharged.

4 III. Exhaustion of State Court Remedies

5 A. Legal Standards

6 A petitioner who is in state custody and wishes to challenge
7 collaterally a conviction by a petition for writ of habeas corpus
8 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
9 The exhaustion doctrine is based on comity to the state court and
10 gives the state court the initial opportunity to correct the
11 state's alleged constitutional deprivations. Coleman v.
12 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
13 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
14 1988).

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

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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
11 state courts in order to give the State the
12 "'opportunity to pass upon and correct' alleged
13 violations of the prisoners' federal rights" (some
14 internal quotation marks omitted). If state courts are
15 to be given the opportunity to correct alleged violations
16 of prisoners' federal rights, they must surely be
17 alerted to the fact that the prisoners are asserting
18 claims under the United States Constitution. If a
19 habeas petitioner wishes to claim that an evidentiary
20 ruling at a state court trial denied him the due
21 process of law guaranteed by the Fourteenth Amendment,
22 he must say so, not only in federal court, but in state
23 court.

24 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
25 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.
26 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th
27 Cir. 2001), stating:

28 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 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, see, e.g., Hiivala v. Wood, 195
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 B. Background

21 Petitioner, an inmate of Avenal State Prison serving a
22 sentence of three hundred (300) days imposed by the Stanislaus
23 County Superior Court, raises claims concerning his convictions
24 of arson and receiving stolen property. Petitioner complains of
25 vindictive prosecution in connection with a stay of sentencing,
26 the allegedly ineffective assistance of his counsel in connection
27 with advice concerning the consequences of his plea, and the
28 alleged invalidity of his guilty plea as unintelligent and
involuntary. (Pet. 1-11.)

Petitioner stated that he did not appeal the judgment, and
he did not file any petitions, applications, or motions with

1 respect to the judgment in any state or federal court. (Pet. 2.)
2 Petitioner marked as not applicable the portion of the form
3 asking if he had appealed to the highest state court having
4 jurisdiction the result of action taken on any petition,
5 application, or motion. In response to a question concerning why
6 there was any failure to appeal from such an adverse action, he
7 stated that he never realized that the charge was not valid.
8 (Pet. 2-3.)

9 In response to the Court's order to show cause, on April 6,
10 2011, Petitioner moved to dismiss his petition without prejudice.

11 On April 27, 2011, the Court issued an informational order
12 to Petitioner informing him that although a dismissal for failure
13 to exhaust state court remedies would be nominally "without
14 prejudice," it was possible and even likely that if the petition
15 were dismissed, Petitioner would be unable to file a subsequent
16 petition due to the statute of limitations. Before the Court
17 ruled on Petitioner's request for voluntary dismissal of the
18 petition, the Court granted Petitioner time to inform the Court
19 whether he still desired to seek voluntary dismissal of the
20 present petition.

21 On May 17, 2011, Petitioner withdrew his motion for
22 dismissal. In the withdrawal, Petitioner informed the Court that
23 he had exhausted state court remedies, and he attached a copy of
24 the order of the Superior Court of the State of California,
25 County of Stanislaus dated May 5, 2011, in which the court denied
26 Petitioner's petition for writ of habeas corpus relating to a
27 felony theft case from 2003. (Docs. 9, 3.)

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1 C. Analysis

2 Petitioner has failed to establish that he exhausted state
3 court remedies because Petitioner has demonstrated only
4 exhaustion in the trial court; he has not shown that he exhausted
5 his state court remedies by presenting his claims to the
6 California Supreme Court.

7 A search of the official website for the California Courts,
8 <http://www.courts.ca.gov>, under Petitioner's name reveals no
9 information.¹ Thus, the available record of state court
10 proceedings is consistent with Petitioner's representation that
11 exhaustion has proceeded to the trial court level, but it further
12 confirms Petitioner's apparent failure to present his claims to
13 the California Supreme Court.

14 Although non-exhaustion of remedies has been viewed as an
15 affirmative defense, it is the petitioner's burden to prove that
16 state judicial remedies were properly exhausted. 28 U.S.C.
17 § 2254(b)(1)(A); Darr v. Burford, 339 U.S. 200, 218-19 (1950),
18 overruled in part on other grounds in Fay v. Noia, 372 U.S. 391
19 (1963); Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).
20 If available state court remedies have not been exhausted as to
21 all claims, a district court must dismiss a petition. Rose v.
22 Lundy, 455 U.S. 509, 515-16 (1982).

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24 _____
25 ¹The Court may take judicial notice of facts that are capable of
26 accurate and ready determination by resort to sources whose accuracy cannot
27 reasonably be questioned, including undisputed information posted on official
28 web sites. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,
333 (9th Cir. 1993); Daniels-Hall v. National Education Association, 629 F.3d
992, 999 (9th Cir. 2010). It is appropriate to take judicial notice of the
docket sheet of a California court. White v Martel, 601 F.3d 882, 885 (9th
Cir. 2010), cert. denied, 131 S.Ct. 332 (2010).

1 Here, Petitioner did not establish exhaustion of state court
2 remedies in the petition. Although the Court provided Petitioner
3 an opportunity to establish exhaustion, Petitioner demonstrated
4 only that he sought relief in the trial court, but not that he
5 had presented his claims to the California Supreme Court.

6 Therefore, it is concluded that Petitioner has failed to
7 meet his burden to establish exhaustion of state court remedies.
8 Accordingly, the petition will be dismissed without prejudice²
9 for failure to exhaust state court remedies.

10 IV. Certificate of Appealability

11 Unless a circuit justice or judge issues a certificate of
12 appealability, an appeal may not be taken to the Court of Appeals
13 from the final order in a habeas proceeding in which the
14 detention complained of arises out of process issued by a state
15 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537
16 U.S. 322, 336 (2003). A certificate of appealability may issue
17 only if the applicant makes a substantial showing of the denial
18

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

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

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 of a constitutional right. § 2253(c)(2). Under this standard, a
2 petitioner must show that reasonable jurists could debate whether
3 the petition should have been resolved in a different manner or
4 that the issues presented were adequate to deserve encouragement
5 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
6 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
7 certificate should issue if the Petitioner shows that jurists of
8 reason would find it debatable whether the petition states a
9 valid claim of the denial of a constitutional right and that
10 jurists of reason would find it debatable whether the district
11 court was correct in any procedural ruling. Slack v. McDaniel,
12 529 U.S. 473, 483-84 (2000).

13 In determining this issue, a court conducts an overview of
14 the claims in the habeas petition, generally assesses their
15 merits, and determines whether the resolution was debatable among
16 jurists of reason or wrong. Id. It is necessary for an
17 applicant to show more than an absence of frivolity or the
18 existence of mere good faith; however, it is not necessary for an
19 applicant to show that the appeal will succeed. Miller-El v.
20 Cockrell, 537 U.S. at 338.

21 A district court must issue or deny a certificate of
22 appealability when it enters a final order adverse to the
23 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

24 Here, it does not appear that reasonable jurists could
25 debate whether the petition should have been resolved in a
26 different manner. Petitioner has not made a substantial showing
27 of the denial of a constitutional right.

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1 Accordingly, the Court will decline to issue a certificate
2 of appealability.

3 V. Disposition

4 Accordingly, it is ORDERED that:

5 1) The order to show cause that issued on March 28, 2011,
6 is DISCHARGED; and

7 2) The petition for writ of habeas corpus is DISMISSED
8 without prejudice for Petitioner's failure to exhaust state court
9 remedies; and

10 3) The Court DECLINES to issue a certificate of
11 appealability; and

12 4) The Clerk is DIRECTED to close the case.

13
14 IT IS SO ORDERED.

15 **Dated: July 29, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE