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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VINCENT ANDRADE,
Petitioner,

v.

ON HABEAS CORPUS,
Respondent.

) 1:11-cv-01028 LJO MJS HC

) ORDER TO SHOW CAUSE WHY THE
) PETITION SHOULD NOT BE DISMISSED
) FOR PETITIONER'S FAILURE TO
) EXHAUST STATE REMEDIES

____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition appears to raise claims challenging his confinement. (Pet., ECF No. 1.)

I. DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). Otherwise, the Court will order Respondent to respond to the petition. Rule 5 of the Rules Governing § 2254 Cases.

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state

1 court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman
2 v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo
3 v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

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

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

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

28 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
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

1 decided under state law on the same considerations that would
2 control resolution of the claim on federal grounds. Hiivala v. Wood,
3 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88
4 F.3d 828, 830-31 (9th Cir. 1996);

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

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

10 Upon review of the instant petition for writ of habeas corpus, it appears that Petitioner
11 has not presented his claims to any California court, including the California Supreme Court.
12 Accordingly, this Court cannot determine which, if any, of his claims have been exhausted.
13 If Petitioner has not presented his claims to the California Supreme Court, the Court cannot
14 proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). It is possible, however, that
15 Petitioner has presented his claims to the California Supreme Court and simply neglected to
16 inform this Court. Thus, Petitioner must inform the Court if his claims have been presented to
17 the California Supreme Court, and if possible, provide the Court with a copy of the petition filed
18 in the California Supreme Court, along with a copy of any ruling made by the California
19 Supreme Court. Without knowing what claims have been presented to the California Supreme
20 Court, the Court is unable to proceed to the merits of the petition.

21 **II. ORDER**

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

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

28 IT IS SO ORDERED.

Dated: August 10, 2011

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE