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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 DISMISSING PETITION FOR  
) WRIT OF HABEAS CORPUS FOR  
) FAILURE TO EXHAUST STATE  
) REMEDIES  
)  
) ORDER DIRECTING THE CLERK OF  
) COURT TO PROVIDE PETITIONER A  
) BLANK CIVIL RIGHTS COMPLAINT FORM

Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

**I. BACKGROUND**

Petitioner is currently in the custody of the California Department of Corrections. On June 15, 2011, Petitioner filed the instant petition for writ of habeas corpus requesting release from confinement at the Fresno County Jail due to his medical condition. (Pet., ECF No. 1.)

Petitioner’s Petition did not indicate whether his claims had been properly presented to any California court. On August 11, 2011, this Court ordered Petitioner to show cause why the petition should not be dismissed for failure to exhaust state remedies. Petitioner was forewarned that failure to comply with the order would result in dismissal of the petition. (Order, ECF No. 6.) Petitioner did not respond to the order to show cause.

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1 **II. DISCUSSION**

2 **A. Procedural Grounds to Dismiss Petition**

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
4 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is  
5 not entitled to relief in the district court . . . .” The Advisory Committee Notes to Rule 5 of the  
6 Rules Governing § 2254 Cases state that “an alleged failure to exhaust state remedies may  
7 be raised by the attorney general, thus avoiding the necessity of a formal answer as to that  
8 ground.” Based on the Rules Governing Section 2254 Cases, the Court will determine  
9 whether Petitioner is entitled to relief pursuant to its authority under Rule 4.

10 **B. Exhaustion of State Remedies**

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

16 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
17 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
18 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);  
19 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Additionally, the petitioner must have  
20 specifically told the state court that he was raising a federal constitutional claim. Duncan, 513  
21 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th Cir.2000), *amended*, 247 F.3d 904  
22 (2001). In Duncan, the United States Supreme Court reiterated the rule as follows:

23 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that  
24 exhaustion of state remedies requires that petitioners "fairly presen[t]" federal  
25 claims to the state courts in order to give the State the "'opportunity to pass upon  
26 and correct alleged violations of the prisoners' federal rights" (some internal  
27 quotation marks omitted). If state courts are to be given the opportunity to  
28 correct alleged violations 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 habeas petitioner wishes to claim that an evidentiary ruling at  
a state court trial denied him the due process of law guaranteed by the  
Fourteenth Amendment, he must say so, not only in federal court, but in state  
court. Duncan, 513 U.S. at 365-366.

1 The Ninth Circuit examined the rule further, stating:

2 Our rule is that a state prisoner has not "fairly presented" (and thus  
3 exhausted) his federal claims in state court *unless he specifically indicated to*  
4 *that court that those claims were based on federal law.* See Shumway v. Payne,  
5 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in  
6 Duncan, this court has held that the *petitioner must make the federal basis of the*  
7 *claim explicit either by citing federal law or the decisions of federal courts, even*  
8 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889 (9th  
9 Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
10 underlying claim would be decided under state law on the same considerations  
11 that would control resolution of the claim on federal grounds. Hiivala v. Wood,  
12 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
13 (9th Cir. 1996); . . . .

14 In Johnson, we explained that the petitioner must alert the state court to  
15 the fact that the relevant claim is a federal one without regard to how similar the  
16 state and federal standards for reviewing the claim may be or how obvious the  
17 violation of federal law is. Lyons, 232 F.3d at 668-669 (italics added).

18 As stated, the Court advised Petitioner that his claims were unexhausted and ordered  
19 him to show cause why his petition should not be dismissed. Petitioner has provided no  
20 evidence that he filed a petition with the California Supreme Court. As Petitioner has not  
21 exhausted his claims in state court, the petition must be dismissed.

22 It is possible that Petitioner is challenging the conditions of his confinement rather than  
23 seeking release from confinement. If so, Petitioner may file a civil rights complaint on the  
24 attached form.

25 **ORDER**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. The Petition for Habeas Corpus be DISMISSED without prejudice<sup>1</sup>; and
- 28 2. The Court orders the Clerk of Court to provide Petitioner a blank civil rights complaint form.

IT IS SO ORDERED.

29 **Dated: September 20, 2011**

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

30 \_\_\_\_\_  
31 <sup>1</sup>A dismissal for failure to exhaust is not a dismissal on the merits, and Petitioner will not be barred from  
32 returning to federal court after Petitioner exhausts available state remedies by 28 U.S.C. § 2244 (b)'s prohibition  
33 on filing second petitions. See In re Turner, 101 F.3d 1323 (9th Cir. 1996).