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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ABEL AGUIRRE,

Petitioner,

v.

UNKNOWN,

Respondent.

) 1:11-cv-01427 AWI MJS HC

) FINDINGS AND RECOMMENDATION TO
) DISMISS PETITION FOR WRIT OF
) HABEAS CORPUS FOR 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.

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections. On August 25, 2011, Petitioner filed the instant petition for writ of habeas corpus in this Court alleging that the judge was unfair in administering his sentence. (Pet. at 3, ECF No. 1.)

Petitioner made no mention in his petition as to whether his claims had been properly presented to the California Supreme Court. On September 27, 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 the failure to comply with the order would result in dismissal of the petition. (Order, ECF No. 7.) The Petitioner was ordered to file the response within thirty days of service of the order to show cause. Over thirty days have passed, and

1 Petitioner has not responded.

2 **II. DISCUSSION**

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

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

11 **B. Exhaustion of State Remedies**

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

17 A petitioner can satisfy the exhaustion requirement by providing the highest state court
18 with a full and fair opportunity to consider each claim before presenting it to the federal court.
19 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);
20 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Additionally, the petitioner must have
21 specifically told the state court that he was raising a federal constitutional claim. Duncan, 513
22 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th Cir.2000), *amended*, 247 F.3d 904
23 (2001). In Duncan, the United States Supreme Court reiterated the rule as follows:

24 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that
25 exhaustion of state remedies requires that petitioners "fairly presen[t]" federal
26 claims to the state courts in order to give the State the "opportunity to pass upon
27 and correct alleged violations of the prisoners' federal rights" (some internal
28 quotation marks omitted). If state courts are to be given the opportunity to
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

1 Fourteenth Amendment, he must say so, not only in federal court, but in state
2 court. Duncan, 513 U.S. at 365-366.

3 The Ninth Circuit examined the rule further, stating:

4 Our rule is that a state prisoner has not "fairly presented" (and thus
5 exhausted) his federal claims in state court *unless he specifically indicated to*
6 *that court that those claims were based on federal law. See Shumway v. Payne,*
7 *223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in*
8 *Duncan*, this court has held that the *petitioner must make the federal basis of the*
9 *claim explicit either by citing federal law or the decisions of federal courts, even*
10 *if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889 (9th*
11 *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*
13 *that would control resolution of the claim on federal grounds. Hiivala v. Wood,*
14 *195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31*
15 *(9th Cir. 1996);*

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

20 As stated above, Petitioner was informed by the Court that the claims of his federal
21 petition were unexhausted and was ordered to show cause why the petition should not be
22 dismissed. Petitioner has not provided any evidence that he filed a petition with the California
23 Supreme Court. As Petitioner has not shown that he has exhausted the claims in the instant
24 petition, it is recommended that the petition be dismissed without prejudice¹.

25 **III. RECOMMENDATION**

26 Accordingly, it is RECOMMENDED that the petition be DISMISSED without prejudice
27 for failure to exhaust state remedies.

28 These findings and recommendations are submitted to the United States District Court
Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule
304 of the Local Rules of Practice for the United States District Court, Eastern District of
California. Within thirty (30) days after being served with a copy, any party may file written
objections with the Court and serve a copy on all parties. Such a document should be
captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the

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

1 objections shall be served and filed within fourteen (14) days (plus three (3) days if served by
2 mail) after service of the objections. The Court will then review the Magistrate Judge's ruling
3 pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections
4 within the specified time may waive the right to appeal the District Court's order. Martinez v.
5 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: November 15, 2011

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE