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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NOKKUWA K. ERVIN,

Petitioner,

v.

M. BITER, Warden,

Respondent.

) 1:11-cv-01437 MJS HC

) ORDER DISMISSING PETITION FOR  
) WRIT OF HABEAS CORPUS FOR  
) FAILURE TO EXHAUST STATE  
) REMEDIES

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

**I. BACKGROUND**

Petitioner is currently in the custody of the California Department of Corrections. On August 26, 2011, Petitioner filed the instant petition for writ of habeas corpus in this Court alleging due process violations arising from a disciplinary violation hearing. (Pet., ECF No. 1.)

Petitioner made no mention in his petition regarding 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. 4.) The Petitioner was ordered to file

1 the response within thirty days of service of the order to show cause.

2 On October 30, 2011, Petitioner filed a response to the order to show cause.  
3 (Response, ECF No. 6.) In the response, Petitioner states that he is aware of the exhaustion  
4 requirement, but provides no evidence that he has presented his claims to the highest state  
5 court. Instead, Petitioner requests that the Court hear his petition out of the interest of justice,  
6 and that “it is just to hear this case. It is moral. It is humane...” (Id.)

7 **II. DISCUSSION**

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

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

16 **B. Exhaustion of State Remedies**

17 A petitioner who is in state custody and wishes to collaterally challenge his conviction  
18 by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. §  
19 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state  
20 court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman  
21 v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

22 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
23 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
24 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);  
25 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Additionally, the petitioner must have  
26 specifically told the state court that he was raising a federal constitutional claim. Duncan, 513  
27 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th Cir.2000), *amended*, 247 F.3d 904  
28 (2001). In Duncan, the United States Supreme Court reiterated the rule as follows:

1 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that  
2 exhaustion of state remedies requires that petitioners "fairly presen[t]" federal  
3 claims to the state courts in order to give the State the "opportunity to pass upon  
4 and correct alleged violations of the prisoners' federal rights" (some internal  
5 quotation marks omitted). If state courts are to be given the opportunity to  
6 correct alleged violations of prisoners' federal rights, they must surely be alerted  
7 to the fact that the prisoners are asserting claims under the United States  
8 Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at  
9 a state court trial denied him the due process of law guaranteed by the  
10 Fourteenth Amendment, he must say so, not only in federal court, but in state  
11 court. Duncan, 513 U.S. at 365-366.

12 The Ninth Circuit examined the rule further, stating:

13 Our rule is that a state prisoner has not "fairly presented" (and thus  
14 exhausted) his federal claims in state court *unless he specifically indicated to*  
15 *that court that those claims were based on federal law.* See Shumway v. Payne,  
16 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in  
17 Duncan, this court has held that the *petitioner must make the federal basis of the*  
18 *claim explicit either by citing federal law or the decisions of federal courts, even*  
19 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889 (9th  
20 Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the  
21 underlying claim would be decided under state law on the same considerations  
22 that would control resolution of the claim on federal grounds. Hiivala v. Wood,  
23 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31  
24 (9th Cir. 1996); . . . .

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

As stated above, Petitioner was informed by the Court that the claims of his federal  
petition were unexhausted and was ordered to show cause why the petition should not be  
dismissed. Petitioner has not provided any evidence that he filed a petition with the California  
Supreme Court. The Court is considerate of Petitioner's interest in having the present case  
adjudicated, and his call for this Court to hear the case out of the interest of justice. However,  
this Court cannot properly hear his claims until they are presented in state court. As Petitioner  
has not shown that he has exhausted the claims in the instant petition, the petition must be  
dismissed.

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**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

The Petition for Habeas Corpus be DISMISSED without prejudice<sup>1</sup>.

IT IS SO ORDERED.

Dated: November 9, 2011

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE

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