

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ERNEST JOHN ESQUIBEL,  
Petitioner,  
  
v.  
  
ON HABEAS CORPUS,  
Respondent.

1:11-cv-01635 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. Petitioner challenges his validation by the California Department of Corrections as an associate of the Mexican Mafia. (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

1 by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. §  
2 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state  
3 court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman  
4 v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo  
5 v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

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

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

18 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that  
19 exhaustion of state remedies requires that petitioners "fairly  
20 present" federal claims to the state courts in order to give the  
21 State the "'opportunity to pass upon and correct' alleged violations  
22 of the prisoners' federal rights" (some internal quotation marks  
23 omitted). If state courts are to be given the opportunity to correct  
24 alleged violations of prisoners' federal rights, they must surely be  
25 alerted to the fact that the prisoners are asserting claims under the  
26 United States Constitution. If a habeas petitioner wishes to claim  
27 that an evidentiary ruling at a state court trial denied him the due  
28 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. 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*

1            *the claim explicit either by citing federal law or the decisions of*  
2            *federal courts, even if the federal basis is "self-evident,"* Gatlin v.  
3            Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.  
4            Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be  
5            decided under state law on the same considerations that would  
6            control resolution of the claim on federal grounds. Hiivala v. Wood,  
7            195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88  
8            F.3d 828, 830-31 (9th Cir. 1996); . . . .

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

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

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

25            **II.    ORDER**

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

30            Petitioner is forewarned that failure to follow this order will result in dismissal of the

31            ////

32            ////

33            ////

1 petition pursuant to Local Rule 110.

2

3

4 IT IS SO ORDERED.

5 Dated: October 14, 2011

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

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28