

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

KEVIN CARNAHAN,	)	1:11-cv-01902-JLT HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS PETITION AS UNEXHAUSTED
v.	)	
	)	ORDER DIRECTING PETITIONER TO FILE A
	)	OBJECTIONS WITHIN TWENTY DAYS
M. D. BITER, Warden,	)	
	)	ORDER DIRECTING CLERK OF COURT TO
Respondent.	)	ASSIGN DISTRICT JUDGE TO CASE

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

The instant petition was filed on November 16, 2011. (Doc. 1). In the petition, Petitioner alleges that a prison disciplinary hearing conducted on April 13, 2010, after which Petitioner was found guilty and, inter alia, placed in administrative segregation and sanctioned with the loss of 360 days' credits, violated Petitioner's federal constitutional rights. (Doc. 1, pp. 10-15).

After a preliminary review of the Petition indicated that all of Petitioner's claims may be unexhausted, the Court, on December 8, 2011, issued an Order to Show Cause why the petition should not be dismissed as containing unexhausted claims. (Doc. 5). That Order to Show Cause gave Petitioner thirty days within which to file his response. To date, Petitioner has not responded to the Court's order.

1           A. Preliminary Review of Petition.

2           Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
3 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
4 petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section  
5 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a  
6 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the  
7 respondent’s motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook,  
8 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

9           B. Exhaustion.

10          A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
11 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
12 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
13 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
14 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d  
15 1158, 1163 (9<sup>th</sup> Cir. 1988).

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 (9<sup>th</sup> Cir. 1996). A federal court will find that the highest  
20 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the  
21 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);  
22 Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

23          Additionally, the petitioner must have specifically told the state court that he was raising  
24 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,  
25 669 (9<sup>th</sup> Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9<sup>th</sup>  
26 Cir. 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir. 1998). In Duncan, the United States  
27 Supreme Court reiterated the rule as follows:

28                   In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of

1 state remedies requires that petitioners “fairly presen[t]” federal claims to the state courts  
2 in order to give the State the “opportunity to pass upon and correct alleged violations of  
3 the prisoners' federal rights” (some internal quotation marks omitted). If state courts are  
4 to be given the opportunity to correct alleged violations of prisoners' federal rights, they  
5 must surely be alerted to the fact that the prisoners are asserting claims under the United  
6 States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a  
7 state court trial denied him the due process of law guaranteed by the Fourteenth  
8 Amendment, he must say so, not only in federal court, but in state court.

9 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

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

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

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

24 In this case, although Petitioner has checked the box on the form petition indicating that  
25 he has presented his claims to the highest state court (Doc. 1, p. 3), he has also indicated on the  
26 form petition that the only appellate court in which he has filed for collateral relief is the  
27 California Court of Appeal, Fifth Appellate District (“5<sup>th</sup> DCA”), which denied his petition on  
28 October 6, 2011, apparently without considering the merits. (Doc. 1, p. 2). In the documents  
attached to the petition, Petitioner includes a copy of the 5<sup>th</sup> DCA’s order denying his habeas  
petition; however, Petitioner does not include any document indicating that he has presented his  
claims to the California Supreme Court.

Moreover, this Court, by accessing the California courts’ electronic database, has verified  
that Petitioner filed his habeas petition in the 5<sup>th</sup> DCA on August 4, 2011, and that the petition  
was denied on October 6, 2011. However, the Court was unable to find any evidence that  
Petitioner had ever filed a habeas petition in the California Supreme Court.

Additionally, understanding that the California Supreme Court routinely takes several

1 months, at a minimum, to consider and rule on a state inmate's habeas petition, the fact that  
2 Petitioner's Court of Appeal petition was denied on October 6, 2011, and the instant petition was  
3 filed on November 16, 2011, a period of only forty days, it seems highly improbable that  
4 Petitioner would have had adequate time to prepare, file, and obtain a ruling from the California  
5 Supreme Court in so short a period of time.

6 Finally, the Court notes that Petitioner has not responded to the Court's December 8,  
7 2011 Order to Show Cause. A petitioner bears the burden of proving that he has either  
8 exhausted his state remedies prior to filing his federal petition or that he satisfies an exception to  
9 the exhaustion requirement. Darr v. Burford, 339 U.S. 200, 218, 70 S.Ct. 587 (1950)(overruled  
10 in part on other grounds by Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963)); accord Parker v.  
11 Kelchner, 429 F.3d 58, 62 (3d Cir. 2005); Miranda v. Cooper, 967 F.2d 392, 398 (10<sup>th</sup> Cir. 1992).  
12 Because he has not provided any evidence to establish that he has presented these claims to the  
13 California Supreme Court, Petitioner has failed to meet his burden. Accordingly, the Court finds  
14 that the instant petition contains only unexhausted claims.

15 The Court must dismiss a petition that contains unexhausted claims, even if it also  
16 contains exhausted claims. Rose, 455 U.S. at 521-22, 102 S.Ct. at 1205; Calderon v. United  
17 States Dist. Court (Gordon), 107 F.3d 756, 760 (9th Cir. 1997) (en banc) *cert. denied*, 118 S.Ct.  
18 265 (1997). More importantly, the Court cannot consider a petition, such as the instant petition  
19 appears to be, that is entirely unexhausted. Rose, 455 U.S. at 521-22; Calderon, 107 F.3d at 760.  
20 Because the instant petition contains only unexhausted claims, it should be dismissed without  
21 prejudice.

### 22 ORDER

23 The Clerk of the Court is DIRECTED to assign a United States District Judge to this  
24 case.

### 25 RECOMMENDATION

26 Accordingly, the Court HEREBY RECOMMENDS that the Petition for Writ of Habeas  
27  
28

1 Corpus be DISMISSED without prejudice as containing only unexhausted claims.<sup>1</sup> This  
2 Findings and Recommendation is submitted to the United States District Court Judge assigned to  
3 the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules  
4 of Practice for the United States District Court, Eastern District of California. Within twenty  
5 (20) days after being served with a copy of this Report and Recommendation, any party may file  
6 written objections with the Court and serve a copy on all parties. Such a document should be  
7 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the  
8 Objections shall be served and filed within fourteen days (plus three days if served by mail) after  
9 service of the Objections. The Court will then review the Magistrate Judge’s ruling pursuant to  
10 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the  
11 specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst,  
12 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

13  
14 IT IS SO ORDERED.

15 Dated: January 24, 2012

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

16  
17  
18  
19  
20  
21  
22 <sup>1</sup> A dismissal for failure to exhaust is not a dismissal on the merits, and Petitioner will not be barred from  
23 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 (9<sup>th</sup> Cir. 1996). However, the Supreme Court has held that:

24 [I]n the habeas corpus context it would be appropriate for an order dismissing a mixed  
25 petition to instruct an applicant that upon his return to federal court he is to bring only  
26 exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made  
aware of the exhaustion requirement, no reason exists for him not to exhaust all potential  
27 claims before returning to federal court. The failure to comply with an order of the court  
is grounds for dismissal with prejudice. Fed. Rules Civ. Proc. 41(b).

28 Slack v. McDaniel, 529 U.S. 473, 489 (2000). Therefore, Petitioner is forewarned that in the event he returns to  
federal court and files a mixed petition of exhausted and unexhausted claims, the petition may be dismissed with  
prejudice.