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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAMON JEROME THOMAS,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

1:12-cv-01319 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 an August 1, 2012 conviction by the Fresno County Superior Court of resisting an officer. (Pet., ECF No. 1.) Petitioner had yet to be sentenced at the time of filing the petition. (Id.)

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.

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

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

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

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

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

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

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

12 Upon review of the instant petition for writ of habeas corpus, it appears that Petitioner
13 has not presented his claims to the highest state court, the California Supreme Court. It is
14 noted that Petitioner addressed the instant petition to the Fresno County Superior Court but
15 filed it with the United States District Court g in Fresno California. If Petitioner did not intend
16 to file his petition in federal court, he may move to withdraw it without prejudice under Federal
17 Rule of Civil Procedure 42(a).

18 However, if Petitioner wishes to proceed in the instant action, he must provide evidence
19 that his claims have been presented to the California Supreme Court. Petitioner failed to
20 provide any information regarding state petitions in the space provided on the habeas corpus
21 petition form. Accordingly, this Court cannot determine which, if any, of his claims have been
22 exhausted. If Petitioner has not presented his claims to the California Supreme Court, the
23 Court cannot proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). It is possible,
24 however, that Petitioner has presented his claims to the California Supreme Court and simply
25 neglected to inform this Court. Thus, Petitioner must inform the Court if his claims have been
26 presented to the California Supreme Court, and if possible, provide the Court with a copy of
27 the petition filed in the California Supreme Court, along with a copy of any ruling made by the
28 California Supreme Court. Without knowing what claims have been presented to the California
Supreme Court, the Court is unable to proceed to the merits of the petition.

29 **II. ORDER**

30 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why the petition should not
31 be dismissed for Petitioner's failure to exhaust state remedies. Petitioner is ORDERED to

1 inform the Court what claims have been presented to the California Supreme Court within
2 thirty (30) days of the date of service of this order.

3 Petitioner is forewarned that failure to follow this order will result in dismissal of the
4 petition pursuant to Local Rule 110.

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6 IT IS SO ORDERED.

7 Dated: September 14, 2012

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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