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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**JOSE LUIS SANTANA,**  
Petitioner,  
  
v.  
  
**UNKNOWN,**  
Respondent.

Case No. 1:13-cv-02034 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 a February 12, 2010 conviction on various drug charges. (Pet., ECF No. 1.) Petitioner presents four claims for relief in the present petition. He asserts that he exhausted the first three claims by way of direct appeal. However, he admits that the fourth claim in the present petition has not been presented to the state courts and is not exhausted. (Pet. at 10.)

On December 18, 2013, the Court ordered Petitioner to show cause why the petition should not be dismissed for failure to exhaust state remedies. (ECF No. 7.) While Petitioner did not respond, the Court received notice from Petitioner's former appellate attorney of a new address for Petitioner following a prison transfer. As Petitioner likely was not served with the order to show cause, the Court shall again order

1 Petitioner to show cause why the petition should not be dismissed.

2 **I. DISCUSSION**

3 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a  
4 preliminary review of each petition for writ of habeas corpus. The Court must dismiss a  
5 petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to  
6 relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d  
7 490 (9th Cir.1990). Otherwise, the Court will order Respondent to respond to the petition.  
8 Rule 5 of the Rules Governing § 2254 Cases.

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

15 A petitioner can satisfy the exhaustion requirement by providing the highest state  
16 court with a full and fair opportunity to consider each claim before presenting it to the  
17 federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S.  
18 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will  
19 find that the highest state court was given a full and fair opportunity to hear a claim if the  
20 petitioner has presented the highest state court with the claim's factual and legal basis.  
21 Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992)  
22 (factual basis).

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

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

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

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

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

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

Upon review of the instant petition for writ of habeas corpus, it appears that  
Petitioner has not presented the fourth claim of his petition to the highest state court, the  
California Supreme Court.

Petitioner must inform the Court if, in fact, claim four has been presented to the  
California Supreme Court, and if possible, provide the Court with a copy of the petition  
filed in the California Supreme Court along with a copy of any ruling made by that Court.  
The Court shall also provide Petitioner the alternative of amending the petition to remove  
the unexhausted claim or moving to stay the petition while he attempts to exhaust state  
remedies. See Rose, 455 U.S. at 521-22; Jefferson v. Budge, 419 F.3d 1013, 1016 (9th  
Cir. 2005) (Courts must dismiss a mixed petition without prejudice to give Petitioner an  
opportunity to exhaust the claim if he can do so.).

1 **II. ORDER**

2 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why the petition should  
3 not be dismissed for Petitioner's failure to exhaust state remedies. Petitioner is  
4 ORDERED to inform the Court if claim four has been presented to the California  
5 Supreme Court and how he desires to proceed with the present petition within thirty (30)  
6 days of the date of service of this order.

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

9  
10 IT IS SO ORDERED.

11 Dated: February 11, 2014

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

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