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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 for 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, Petitioner admits that the fourth claim of the present petition has not been presented to the state courts and is not exhausted. (Pet. at 10.)

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

1 490 (9th Cir.1990). Otherwise, the Court will order Respondent to respond to the petition.
2 Rule 5 of the Rules Governing § 2254 Cases.

3 A petitioner who is in state custody and wishes to collaterally challenge his
4 conviction by a petition for writ of habeas corpus must exhaust state judicial remedies.
5 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court
6 and gives the state court the initial opportunity to correct the state's alleged constitutional
7 deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S.
8 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

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

17 Additionally, the petitioner must have specifically told the state court that he was
18 raising a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford,
19 232 F.3d 666, 669 (9th Cir.2000), amended, 247 F.3d 904 (2001); Hiivala v. Wood, 195
20 F.3d 1098, 1106 (9th Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In
21 Duncan, the United States Supreme Court reiterated the rule as follows:

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

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

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

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

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

22 Petitioner must inform the Court if, in fact, claim four has been presented to the
23 California Supreme Court, and if possible, provide the Court with a copy of the petition
24 filed in the California Supreme Court along with a copy of any ruling made by the
25 California Supreme Court.

26 The Court shall provide Petitioner the opportunity to amend the petition to remove
27 the unexhausted claim or to move to stay the petition while he attempts to exhaust state
28 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.).

II. **ORDER**

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

