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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JON ISAAC PALOMINO,
Petitioner,
v.
ROBERT W. FOX, Warden, California
Medical Facility,
Respondent.

No. 1:16-cv-00210-SKO HC
**ORDER DISMISSING CASE FOR
FAILURE TO EXHAUST**
(Doc. 12)

Petitioner Jon Isaac Palomino is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ On April 18, 2016, Respondent Robert W. Fox, the Warden of the California Medical Facility where Petitioner is incarcerated, filed a motion to dismiss the petition for Petitioner’s failure to exhaust his state remedies. Petitioner did not reply to the motion to dismiss.

I. Exhaustion of State Remedies

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501

¹ Pursuant to 28 U.S.C. § 636(c)(1), both parties consented, in writing, to the jurisdiction of a United States Magistrate Judge to conduct all further proceedings in this case, including the entry of final judgment.

1 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*, 854 F.2d 1158,
2 1163 (9th Cir. 1988).

3 A petitioner can satisfy the exhaustion requirement by providing the highest state court
4 with a full and fair opportunity to consider each claim before presenting it to the federal court.
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6 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971);
7 *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state
8 court was given a full and fair opportunity to hear a claim if the petitioner has presented the
9 highest state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365; *Kenney v.*
10 *Tamayo-Reyes*, 504 U.S. 1, 8 (1992). The petitioner must also have specifically informed the
11 state court that he was raising a federal constitutional claim. *Duncan*, 513 U.S. at 365-66; *Lyons*
12 *v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); *Hiivala v. Wood*,
13 195 F.3d 1098, 1106 (9th Cir. 1999); *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998).

14
15 The authority of a court to hold a mixed petition in abeyance pending exhaustion of the
16 unexhausted claims has not been extended to petitions that contain no exhausted claims.
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18 *Raspberry*, 448 F.3d at 1154.

19 Petitioner does not contend that he has presented his claims to the California Supreme
20 Court. Although non-exhaustion of state court remedies has been viewed as an affirmative
21 defense, it is petitioner's burden to prove that state judicial remedies were properly exhausted. 28
22 U.S.C. § 2254(b)(1)(A); *Darr v. Burford*, 339 U.S. 200, 218-19 (1950), *overruled in part on other*
23 *grounds in Fay v. Noia*, 372 U.S. 391 (1963); *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir.
24 1981). If available state court remedies have not been exhausted as to all claims, a district court
25 must dismiss a petition. *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982). *See also Raspberry v.*
26 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice* 276 F.3d 478, 481 (9th Cir. 2001)
27 (both holding that when none of a petitioner's claims has been presented to the highest state court
28

1 as required by the exhaustion doctrine, the Court must dismiss the petition).

2 **VIII. Certificate of Appealability**

3 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
4 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
5 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
6 certificate of appealability is 28 U.S.C. § 2253, which provides:
7

8 (a) In a habeas corpus proceeding or a proceeding under section 2255
9 before a district judge, the final order shall be subject to review, on appeal, by
the court of appeals for the circuit in which the proceeding is held.

10 (b) There shall be no right of appeal from a final order in a proceeding
11 to test the validity of a warrant to remove to another district or place for
12 commitment or trial a person charged with a criminal offense against the
13 United States, or to test the validity of such person's detention pending
removal proceedings.

14 (c) (1) Unless a circuit justice or judge issues a certificate of
15 appealability, an appeal may not be taken to the court of appeals from—

16 (A) the final order in a habeas corpus proceeding in which the
17 detention complained of arises out of process issued by a State court; or

18 (B) the final order in a proceeding under section 2255.

19 (2) A certificate of appealability may issue under paragraph (1)
20 only if the applicant has made a substantial showing of the denial of a
21 constitutional right.

22 (3) The certificate of appealability under paragraph (1) shall
23 indicate which specific issues or issues satisfy the showing required by
24 paragraph (2).

25 If a court denies a habeas petition, the court may only issue a certificate of appealability
26 "if jurists of reason could disagree with the district court's resolution of his constitutional claims
27 or that jurists could conclude the issues presented are adequate to deserve encouragement to
28 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although the petitioner is not required to prove the merits of his case, he must demonstrate

1 "something more than the absence of frivolity or the existence of mere good faith on his . . .
2 part." *Miller-El*, 537 U.S. at 338.

3 Reasonable jurists would not find the Court's determination that Petitioner did not exhaust
4 his state remedies debatable, wrong, or deserving of encouragement to proceed further.
5 Accordingly, the Court declines to issue a certificate of appealability.
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7 **III. Conclusion and Order**

8 Accordingly, it is hereby ORDERED:

- 9 (1) The petition for writ of habeas corpus is DISMISSED without prejudice;
10 (2) The Court declines to issue a certificate of appealability; and
11 (3) The Clerk of Court is directed to enter judgment for Respondent and close the
12 case.
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15 IT IS SO ORDERED.

16 Dated: June 5, 2016

/s/ Sheila K. Overt
UNITED STATES MAGISTRATE JUDGE

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