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

RUBEN ROCHA CASTRO,
Petitioner,

v.

KERN COUNTY SUPERIOR COURT,
Respondent.

Case No. 1:16-cv-01309 MJS (HC)

**FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS FOR FAILURE TO
EXHAUST STATE REMEDIES**

**ORDER DIRECTING CLERK OF COURT TO
ASSIGN DISTRICT COURT JUDGE TO THE
PRESENT MATTER**

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 May 2, 2016 conviction from the Kern County Superior Court for first degree murder. (Pet., ECF No. 1.) Petitioner states in his petition that his direct appeal of the conviction to the California Court of Appeal, Fifth Appellate District is still pending.

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections. On August 22, 2016, Petitioner filed the instant petition for writ of habeas corpus in this Court challenging his murder conviction. (Pet., ECF No. 1.)

Upon review of the petition for writ of habeas corpus, it appears that Petitioner has not presented any of the claims set forth in the petition to the highest state court, the

1 California Supreme Court. On September 12, 2016, this Court ordered Petitioner to show
2 cause why the petition should not be dismissed for failure to exhaust state remedies.
3 Petitioner was forewarned that the failure to comply with the order would result in
4 dismissal of the petition. (Order, ECF No. 6.) Petitioner was ordered to file the response
5 within thirty days of service of the order to show cause. More than thirty days have
6 passed and Petitioner has not filed a response.

7 **II. DISCUSSION**

8 **A. Procedural Grounds to Dismiss Petition**

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
10 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
11 petitioner is not entitled to relief in the district court” The Advisory Committee Notes
12 to Rule 5 of the Rules Governing § 2254 Cases state that “an alleged failure to exhaust
13 state remedies may be raised by the attorney general, thus avoiding the necessity of a
14 formal answer as to that ground.” Based on the Rules Governing Section 2254 Cases,
15 the Court will determine whether Petitioner is entitled to relief pursuant to its authority
16 under Rule 4.

17 **B. Exhaustion of State Remedies**

18 A petitioner who is in state custody and wishes to collaterally challenge his
19 conviction by a petition for writ of habeas corpus must exhaust state judicial remedies.
20 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court
21 and gives the state court the initial opportunity to correct the state's alleged constitutional
22 deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S.
23 509, 518 (1982).

24 A petitioner can satisfy the exhaustion requirement by providing the highest state
25 court with a full and fair opportunity to consider each claim before presenting it to the
26 federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S.
27 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). Additionally, the
28 petitioner must have specifically told the state court that he was raising a federal

1 constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
2 (9th Cir. 2000), amended, 247 F.3d 904 (2001). In Duncan, the United States Supreme
3 Court reiterated the rule as follows:

4 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that
5 exhaustion of state remedies requires that petitioners "fairly present[]" federal claims to the state courts in order to give the State the
6 "opportunity to pass upon and correct alleged violations of the prisoners' federal rights" (some internal quotation marks omitted). If state courts are
7 to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are
8 asserting claims under the United States Constitution. If a habeas 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 Amendment, he must say so, not only in federal court, but in state court.

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

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

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

20 Lyons, 232 F.3d at 668-669 (italics added).

21 As stated above, Petitioner was informed by the Court that the claims of his
22 federal petition were unexhausted and was ordered to show cause why the petition
23 should not be dismissed. Petitioner did not respond. As Petitioner has not presented
24 evidence that he has exhausted the claims in the instant petition with the California
25 Supreme Court, the petition must be dismissed.

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1 **III. RECOMMENDATION**

2 Accordingly, it is RECOMMENDED that the petition be DISMISSED without
3 prejudice for failure to exhaust state court remedies. Further, the Court ORDERS the
4 Clerk of Court to assign a District Court Judge to the present matter.

5 These findings and recommendations are submitted to the United States District
6 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636
7 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
8 Eastern District of California. Within thirty (30) days after being served with a copy, any
9 party may file written objections with the Court and serve a copy on all parties. Such a
10 document should be captioned "Objections to Magistrate Judge's Findings and
11 Recommendations." Replies to the objections shall be served and filed within fourteen
12 (14) days (plus three (3) days if served by mail) after service of the objections. The Court
13 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The
14 parties are advised that failure to file objections within the specified time may waive the
15 right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th
16 Cir. 2014).

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18 IT IS SO ORDERED.

19 Dated: October 18, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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