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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GILIBALDO DELTORO,
Petitioner,
v.
PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

Case No. 1:17-cv-01283-MJS (HC)

**ORDER TO SHOW CAUSE WHY THE
PETITION SHOULD NOT BE DISMISSED
FOR PETITIONER'S FAILURE TO
EXHAUST STATE REMEDIES**

(ECF No. 1)

THIRTY (30) DAY DEADLINE

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 March 8, 2017 judgment of the Tuolumne County Superior Court. He states that his appeal to the California Fifth District Court of Appeal remains pending. (ECF No. 1 at 5.) Petitioner does not state that he has pursued any other review of his conviction or presented his claims to the California Supreme Court.

1 **I. Discussion**

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

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

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

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

27 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that
28 exhaustion of state remedies requires that petitioners "fairly present"

1 federal claims to the state courts in order to give the State the
2 "opportunity to pass upon and correct' alleged violations of the prisoners'
3 federal rights" (some internal quotation marks omitted). If state courts are
4 to be given the opportunity to correct alleged violations of prisoners'
5 federal rights, they must surely be alerted to the fact that the prisoners are
6 asserting claims under the United States Constitution. If a habeas
7 petitioner wishes to claim that an evidentiary ruling at a state court trial
8 denied him the due process of law guaranteed by the Fourteenth
9 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
12 exhausted) his federal claims in state court unless he specifically indicated
13 to that court that those claims were based on federal law. See Shumway
14 v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme
15 Court's decision in Duncan, this court has held that the petitioner must
16 make the federal basis of the claim explicit either by citing federal law or
17 the decisions of federal courts, even if the federal basis is "self-evident,"
18 Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
19 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
20 decided under state law on the same considerations that would control
21 resolution of the claim on federal grounds. Hiivala v. Wood, 195 F3d 1098,
22 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir.
23 1996);

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

28 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 his claims to the highest state court, the California Supreme
Court. Petitioner must inform the Court if, in fact, his claims have 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 the
California Supreme Court. Without knowing what claims, if any, have been presented to
the California Supreme Court, the Court is unable to proceed to the merits of the petition.
28 U.S.C. § 2254(b)(1).

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

1 ORDERED to inform the Court what claims have been presented to the California
2 Supreme Court within 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
4 the petition pursuant to Local Rule 110.

5
6 IT IS SO ORDERED.

7 Dated: September 29, 2017

1st Michael J. Seng
8 UNITED STATES MAGISTRATE JUDGE

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