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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK ANTHONY,
Petitioner,
v.
JOHN GARZA, Warden,
Respondent.

Case No. 1:18-cv-00096-MJS (HC)

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

(ECF Nos. 1, 5, 8)

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 the August 13, 2017 decision of the California Board of Parole Hearings, denying him parole. Petitioner does not state whether he has presented his claims to the California Supreme Court. Although he cites to a California Supreme Court decision from 2017 in Case No. S238533, it appears that this petition addressed Petitioner's underlying conviction. Additionally, a review of the Supreme Court docket reflects that the petition was disposed of on March 15, 2017, prior to the Board of Parole Hearings' decision. Accordingly, it appears that Petitioner has not

1 exhausted his state remedies with respect to the claims presented here.

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
8 petition. 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:

1 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that
2 exhaustion of state remedies requires that petitioners "fairly present"
3 federal claims to the state courts in order to give the State the
4 "opportunity to pass upon and correct" alleged violations of the prisoners'
5 federal rights" (some internal quotation marks omitted). If state courts are
6 to be given the opportunity to correct alleged violations of prisoners'
7 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
9 petitioner wishes to claim that an evidentiary ruling at a state court trial
10 denied him the due process of law guaranteed by the Fourteenth
11 Amendment, he must say so, not only in federal court, but in state court.

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

13 Our rule is that a state prisoner has not "fairly presented" (and thus
14 exhausted) his federal claims in state court unless he specifically indicated
15 to that court that those claims were based on federal law. See Shumway
16 v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme
17 Court's decision in Duncan, this court has held that the petitioner must
18 make the federal basis of the claim explicit either by citing federal law or
19 the decisions of federal courts, even if the federal basis is "self-evident,"
20 Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
21 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
22 decided under state law on the same considerations that would control
23 resolution of the claim on federal grounds. Hiivala v. Wood, 195 F3d 1098,
24 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir.
25 1996);

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

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

The instant petition for writ of habeas corpus reflects that Petitioner has not
presented his claims to the highest state court, the California Supreme Court. If
Petitioner has, in fact, presented his claims to the California Supreme Court, he must so
advise this Court and, if possible, provide this Court with a copy of the petition filed in the
California Supreme Court along with any ruling thereon. Without information to suggest
that the claims 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

Based on the foregoing, Petitioner is ORDERED TO SHOW CAUSE why the
petition should not be dismissed for Petitioner's failure to exhaust state remedies. Within

1 thirty (30) days of the date of service of this order, Petitioner shall inform the Court what
2 claims, if any, have been presented to the California Supreme Court.

3 If Petitioner fails to respond to this order or fails to show cause why the petition
4 should not be dismissed, the undersigned will recommend dismissal of the petition
5 without prejudice for failure to exhaust state remedies.

6
7 IT IS SO ORDERED.

8 Dated: January 29, 2018

Isl. Michael J. Seng
9 UNITED STATES MAGISTRATE JUDGE

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