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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SARON GREEN,
Petitioner,
v.
ON HABEAS CORPUS,
Respondent.

Case No. 1:18-cv-00223-DAD-MJS (HC)
**FINDINGS AND RECOMMENDATION TO
DISMISS PETITION BASED ON
PETITIONER'S FAILURE TO EXHAUST
STATE COURT REMEDIES**
FOURTEEN 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 May 15, 2013 judgement of the Kern County Superior Court. (ECF No. 1 at 1.) He raises four grounds for relief and states that none of the grounds have been presented to the California Supreme Court.

It appearing that Petitioner had not exhausted his state court remedies with respect to the claims presented here, the undersigned ordered Petitioner to show cause why the action should not be dismissed. (ECF No. 4.) Petitioner did not respond and the time for doing so has passed. Accordingly, the undersigned will recommend dismissal of the petition.

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 F.3d 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 was afforded the opportunity to provide additional information in this
regard but failed to do so. Because the claims have not been presented to the state's
highest court, the Court is unable to proceed to the merits of the petition. 28 U.S.C.
§ 2254(b)(1).

II. Conclusion and Recommendation

It is HEREBY RECOMMENDED that the petition be dismissed without prejudice
for failure to exhaust state court remedies.

The findings and recommendation are submitted to the United States District
Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within

1 **fourteen (14)** days after being served with the findings and recommendation, any party
2 may file written objections with the Court and serve a copy on all parties. Such a
3 document should be captioned “Objections to Magistrate Judge’s Findings and
4 Recommendation.” Any reply to the objections shall be served and filed within fourteen
5 (14) days after service of the objections. The parties are advised that failure to file
6 objections within the specified time may result in the waiver of rights on appeal.
7 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
8 F.2d 1391, 1394 (9th Cir. 1991)).

9
10 IT IS SO ORDERED.

11 Dated: March 26, 2018

1st Michael J. Seng
12 UNITED STATES MAGISTRATE JUDGE