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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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11 THOMAS L. GOFF,

No. CIV S-10-0269-JAM-CMK-P

12 Petitioner,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 M. SALINAS,

15 Respondent.  
16 \_\_\_\_\_/

17 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of  
18 habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent's motion to  
19 dismiss (Doc. 14) based on failure to exhaust state court remedies.  
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21 **I. BACKGROUND**

22 Petitioner was convicted following a plea of no contest to receiving stolen  
23 property. Petitioner admitted a prior strike and, on June 4, 2009, he was sentenced to a  
24 determinate term of four years in state prison. Petitioner did not file a timely direct appeal.  
25 Petitioner filed a habeas corpus petition in the Stanislaus County Superior Court in which he  
26 alleged violations relating to the conditions of his confinement at the Stanislaus County Jail. In a

1 second state habeas petition, petitioner claims that he did not receive discovery regarding his  
2 criminal case and that he was misinformed regarding the “time constraints” of his plea bargain.  
3 Both petitions were denied on June 18, 2009. Petitioner then filed two habeas petitions in the  
4 California Court of Appeal, both of which were denied. Petitioner filed a petition for review in  
5 the California Supreme Court on September 21, 2009, arguing that he should be permitted to file  
6 a late direct appeal. The petition for review was denied without comment or citation on October  
7 28, 2009.

## 9 II. DISCUSSION

10 Respondent argues that the instant federal petition contains only unexhausted  
11 claims. Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required before  
12 claims can be presented to the federal court in a habeas corpus case. See Rose v. Lundy, 455  
13 U.S. 509 (1982); see also Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003); Hunt v. Pliler,  
14 336 F.3d 839 (9th Cir. 2003). “A petitioner may satisfy the exhaustion requirement in two ways:  
15 (1) by providing the highest state court with an opportunity to rule on the merits of the claim . . . ;  
16 or (2) by showing that at the time the petitioner filed the habeas petition in federal court no state  
17 remedies are available to the petitioner and the petitioner has not deliberately by-passed the state  
18 remedies.” Batchelor v. Cupp, 693 F.2d 859, 862 (9th Cir. 1982) (citations omitted). The  
19 exhaustion doctrine is based on a policy of federal and state comity, designed to give state courts  
20 the initial opportunity to correct alleged constitutional deprivations. See Picard v. Connor, 404  
21 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518.

22 Regardless of whether the claim was raised on direct appeal or in a post-  
23 conviction proceeding, the exhaustion doctrine requires that each claim be fairly presented to the  
24 state’s highest court. See Castille v. Peoples, 489 U.S. 346 (1989). Although the exhaustion  
25 doctrine requires only the presentation of each federal claim to the highest state court, the claims  
26 must be presented in a posture that is acceptable under state procedural rules. See Sweet v.

1 Cupp, 640 F.2d 233 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is  
2 denied by the state courts on procedural grounds, where other state remedies are still available,  
3 does not exhaust the petitioner's state remedies. See Pitchess v. Davis, 421 U.S. 482, 488  
4 (1979); Sweet, 640 F.2d at 237-89.<sup>1</sup>

5 In addition to presenting the claim to the state court in a procedurally acceptable  
6 manner, exhaustion requires that the petitioner make the federal basis of the claim explicit to the  
7 state court by including reference to a specific federal constitutional guarantee. See Gray v.  
8 Netherland, 518 U.S. 152, 162-63 (1996); see also Shumway v. Payne, 223 F.3d 982, 998 (9th  
9 Cir. 2000). It is not sufficient for the petitioner to argue that the federal nature of the claim is  
10 self-evident. See Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d  
11 904 (9th Cir. 2001). Nor is exhaustion satisfied if the state court can only discover the issue by  
12 reading a lower court opinion in the case. See Baldwin v. Reese, 541 U.S. 27, 32 (2004).

13 In this case, respondent notes that petitioner never presented any of the claims  
14 raised in the federal petition to the California Supreme Court. Respondent is correct. A review  
15 of the petition for review filed in the California Supreme Court, which respondent has lodged in  
16 support of his motion to dismiss, reflects that petitioner did not raise any of the claims he now  
17 raises in the federal petition. The only issue argued by petitioner to the California Supreme  
18 Court was whether he should be permitted to file a late direct appeal. Because petitioner has not  
19 presented his federal claims to the state's highest court, the claims are unexhausted and the  
20 federal petition must be dismissed.

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24 <sup>1</sup> This situation of procedural deficiency is distinguishable from a case presented to  
25 the state court using proper procedures but where relief on the merits is precluded for some  
26 procedural reason, such as untimeliness or failure to raise the claim on direct appeal. The former  
represents an exhaustion problem; the latter represents a procedural default problem.

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These findings and recommendations 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 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

  
CRAIG M. KELLISON  
UNITED STATES MAGISTRATE JUDGE