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

HENRY C. WILLIAMS, III,

Petitioner,

No. CIV S-10-0310 LKK DAD P

vs.

K. DICKINSON,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Therein, petitioner challenges the 2008 decision of the California Board of Parole Hearings (hereinafter “Board”)<sup>1</sup> finding him unsuitable for parole at his initial parole consideration hearing. Before the court is respondent’s motion to dismiss the petition on the grounds that petitioner failed to properly exhaust his federal habeas claims by first fairly presenting them to the highest state court. Petitioner has filed an opposition to the motion.

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<sup>1</sup> Although petitioner refers to the Board of Prison Hearings, the Board of Prison Terms, effective July 1, 2005, was re-named the Board of Parole Hearings (‘BPH’). See In re Olson, 149 Cal. App. 4th 790, 793 n.1 (2007).



1 a copy of the transcript of his 2008 parole and instead, included only copies of his psychosocial  
2 assessment, the face sheet for the Board’s decision and lower state court decisions denying his  
3 previous habeas petitions. (Id. at 3-4. ) Respondent argues that a citation to Duvall “stands for  
4 the proposition that a petitioner must ‘state fully and with particularity the facts on which relief is  
5 sought’ and ‘include copies of reasonably available documentary evidence supporting the claim,  
6 including pertinent portions of trial transcripts and affidavits or declarations.’” (Id. at 3) (quoting  
7 Millan v. Marshall, 677 F. Supp. 2d 1217, 1220 (C.D. Cal. 2009). Respondent argues that since  
8 petitioner did not submit a copy of the hearing transcript with his final state habeas petition, the  
9 California Supreme Court never adjudicated the merits of his claims. Accordingly, respondent  
10 contends, the claims in the habeas petition pending before this court are unexhausted and the  
11 petition should be dismissed.

## 12 II. Petitioner’s Opposition

13           Petitioner asserts that he has exhausted his claims by fairly presenting them to the  
14 highest state court. He argues that he first presented his claims to the Alameda County Superior  
15 Court and when that court issued a “fundamentally unfair decision,” he asked the California  
16 Court of Appeal to address the constitutional violations. (Opp’n at 2.) Petitioner contends that  
17 when the California Court of Appeal summarily denied his petition, he filed a habeas petition  
18 with the California Supreme Court in which he presented all of his current claims for relief. (Id.)  
19 Addressing respondent’s specific arguments, petitioner asserts that he fulfilled the requirements  
20 of California law in his petition filed with the California Supreme Court, noting that he is not  
21 required to provide the court with every piece of evidence in support of his claims. (Id. at 3.)  
22 Petitioner also notes that the California Supreme Court’s bare citation to Duvall without  
23 comment does not mean that he failed to exhaust his claims. (Id.) Petitioner argues that in his  
24 case the state courts failed to adhere to established rules and procedures governing habeas corpus  
25 actions. (Id. at 4.) Petitioner takes the position that the state courts should adjudicate habeas  
26 petitions instead of “merely passing the buck up to the federal court[.]” (Id.) Petitioner

1 concludes by asserting that state court habeas remedies are “fundamentally inadequate” since he  
2 provided those courts with “all documents needed to issue an Order to Show Cause or Hold an  
3 Evidentiary Hearing, including the Board Decision Fact Sheet outlining Denial Criteria.” (Id.)

#### 4 ANALYSIS

##### 5 I. Exhaustion Requirement

6 State courts must be given the first opportunity to consider and address a state  
7 prisoner’s habeas corpus claims. See Rhines v. Weber, 544 U.S. 269, 273-74 (2005) (citing Rose  
8 v. Lundy, 455 U.S. 509, 518-19 (1982)); King v. Ryan, 564 F.3d 1133, 1138 (9th Cir. 2009)  
9 (“Habeas petitioners have long been required to adjudicate their claims in state court - that is,  
10 ‘exhaust’ them - before seeking relief in federal court.”); Farmer v. Baldwin, 497 F.3d 1050,  
11 1053 (9th Cir. 2007) (“This so-called ‘exhaustion requirement’ is intended to afford ‘the state  
12 courts a meaningful opportunity to consider allegations of legal error’ before a federal habeas  
13 court may review a prisoner’s claims.”) (quoting Vasquez v. Hillery, 474 U.S. 254, 257 (1986)).  
14 In general, a federal court will not grant a state prisoner’s application for a writ of habeas corpus  
15 unless “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C.  
16 § 2254(b)(1). The exhaustion requirement will not be deemed to have been waived unless the  
17 state, through counsel, expressly waives the requirement. 28 U.S.C. § 2254(b)(3).

18 A petitioner satisfies the exhaustion requirement by fairly presenting to the  
19 highest state court all federal claims before presenting the claims to the federal court. See  
20 Baldwin v. Reese, 541 U.S. 27, 29 (2004); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v.  
21 Connor, 404 U.S. 270, 276 (1971); Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008). A  
22 federal claim is fairly presented if the petitioner has described the operative facts and the federal  
23 legal theory upon which his claim is based. See Wooten, 540 F.3d at 1025 (“Fair presentation  
24 requires that a state’s highest court has ‘a fair opportunity to consider . . . and to correct [the]  
25 asserted constitutional defect.”); Lounsbury v. Thompson, 374 F.3d 785, 787 (9th Cir. 2004)  
26 (same) (quoting Picard, 404 U.S. at 276)); Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir.

1 1999); see also Bland v. California Dep't of Corrs., 20 F.3d 1469, 1473 (9th Cir. 1994).

2 II. Discussion

3 Respondent argues that the California Supreme Court's citation to Duvall in its  
4 order denying habeas relief means that the merits of petitioner's claims were never addressed by  
5 that court because he did not attach a copy of his hearing transcript to his petition filed with that  
6 court. Respondent notes that one California district court has held that such an omission violates  
7 the fair presentation requirement:

8 Since petitioner did not attach a copy of the [parole] Board's  
9 decision to his habeas corpus petition, the [California] Supreme  
10 Court's citation to Duvall stands for the proposition that the  
11 petition was incomplete and an amended petition should be filed;  
12 thus, the Supreme Court did not consider the merits of petitioner's  
13 claim . . . petitioner chose not to refile an amended petition in the  
14 California Supreme Court. Thus, petitioner's claims have not been  
15 fairly presented to the California Supreme Court for its  
16 consideration and have not been exhausted, and the pending  
17 petition must be dismissed without prejudice.

18 Millan, 677 F. Supp. 2d at 1220-21. Other district courts have come to a similar conclusion. See  
19 Scott v. Wong, No. C 09-0051 SBA (PR), 2010 WL 3910183, at \*3-4 (N.D. Cal. Sept. 30, 2010)  
20 (concluding that petitioner's claim was unexhausted where the state court cited to Duvall in  
21 denying relief and petitioner had failed to submit the full parole hearing transcript so that the  
22 state court could review his "some evidence" claim); Spade v. Haviland, No. CIV S-09-2124-  
23 GEB-CMK-P, 2010 WL 3034686, at \*3 (E.D. Cal. July 28, 2010) (concluding that the federal  
24 habeas petition presented an unexhausted claim where the California Supreme Court cited to  
25 Duvall, 9 Cal. 4th at 474, and petitioner could have cured the pleading defect by submitting the  
26 transcript of the parole hearing to that court); Kilpatrick v. Hartley, No. EDCV 09-1410-JFW  
(OP), 2010 WL 4053664, at \*4 (C.D. Cal. July 20, 2010) (holding that petitioner did not fairly  
present his habeas claim to the California Supreme Court where his habeas petition to that court  
was denied with a citation to Duvall and he failed to attach any supporting documents to his state  
habeas petition); Magee v. Clark, No. 1:09-CV-01663 OWW GSA HC, 2010 WL 2824654, at \*3

1 (E.D. Cal. July 15, 2010) (concluding that petitioner’s parole habeas claim was unexhausted  
2 because the California Supreme Court denied his state petition with citations to In re Miller,<sup>17</sup>  
3 Cal. 2d 734 (1941) and Duvall, and petitioner had failed to provide that court with a transcript of  
4 his parole hearing); Sanders v. Salzar, No. 1:08-cv-01357-AWI-BAK-GSA HC, 2009 WL  
5 2923057, at \*4 (E.D. Cal. Sept. 4, 2009) (finding that although petitioner included the transcript  
6 of his parole hearing with his initial state habeas petition, he failed to provide a copy of that  
7 transcript with his petition filed in the California Supreme Court, and thus, that court’s citation to  
8 Duvall supported the conclusion that petitioner did not properly exhaust his habeas claim). But  
9 see Green v. Clark, No. 1:09-cv-01518 OWW MJS HC, 2010 WL 3516703, at \*5-6 (E.D. Cal.  
10 Sept. 7, 2010) (concluding that a claim was fairly presented to the California Supreme Court,  
11 even though petitioner did not attach a complete copy of the parole hearing transcript and  
12 decision to his state habeas petition because petitioner had provided that court “significant detail”  
13 and information concerning his habeas claim).

14 Here, the court concludes that petitioner has not fairly presented his claims to the  
15 California Supreme Court. In his habeas petition submitted to that court petitioner argued that  
16 the Board’s decision to deny him parole did not satisfy the “some evidence” standard and was  
17 arbitrary and capricious. (Doc. No. 21-1 at 6-7.) However, the only way the California Supreme  
18 Court could have assessed the merits of petitioner’s claims would be to review the parole hearing  
19 transcript to determine how the Board panel reached their decision. Although petitioner provided  
20 the California Supreme Court with his psychosocial assessment, the Board’s “Life Prisoner  
21 Hearing Decision Face Sheet,” and the decisions of the Alameda County Superior Court and  
22 California Court of Appeal denying habeas, those documents did not provide a complete  
23 explanation of the Board’s decision nor do those documents and the petition filed with the  
24 California Supreme Court provide sufficient detail concerning the basis for petitioner’s claims.  
25 Moreover, the parole hearing transcript was reasonably available to petitioner as evidenced by the  
26 fact that he had attached it to his earlier state habeas petitions. See Smith v. Subia, No. CIV S-

1 07-1699 LKK DAD P, 2008 WL 2220431, at \*3 n.3 (E.D. Cal. May 27, 2008) (“Unless it  
2 appears that the petitioner did not submit a copy of the transcript of decision to the California  
3 Supreme Court even though that transcript was reasonably available to petitioner at the time, a  
4 bare citation to Duvall in denying state habeas relief is unlikely to constitute an adequate  
5 independent state-law ground for denial.”). For reasons unknown, petitioner did not attach the  
6 hearing transcript to his habeas petition filed with the California Supreme Court. He had the  
7 opportunity to cure this deficiency by filing an amended pleading with the California Supreme  
8 Court. Because he did not do so, petitioner failed to fairly present his habeas claims to the  
9 California Supreme Court before submitting them to this court. Accordingly, his federal petition  
10 presents only unexhausted claims and must be dismissed.<sup>2</sup>

#### 11 CONCLUSION

12 Accordingly, IT IS HEREBY RECOMMENDED that:

- 13 1. Respondent’s June 30, 2010 motion to dismiss (Doc. No. 21) be granted;
- 14 2. This action be dismissed without prejudice for failure to exhaust state court  
15 remedies.

16 These findings and recommendations are submitted to the United States District  
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
18 one days after being served with these findings and recommendations, any party may file written  
19 objections with the court and serve a copy on all parties. Such a document should be captioned  
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
21 shall be served and filed within seven days after service of the objections. The parties are

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22  
23 <sup>2</sup> Even were this not the case, the pending habeas petition challenging the Board’s  
24 decision to deny parole - on the grounds that the decision was not supported by “some evidence”  
25 and was otherwise unfair - should be dismissed. In this regard, the record before this court  
26 appears to establish that petitioner received a parole suitability hearing and that the Board panel  
provided him a reason for the denial of parole. Therefore, his federal habeas petition would be  
subject to summary dismissal pursuant to the U.S. Supreme Court’s recent decision in Swarthout  
v. Cooke, 562 U.S.\_\_\_\_, 2011 WL 197627 (Jan. 24, 2011) (per curiam).

1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,  
3 951 F.2d 1153 (9th Cir. 1991). In his objections, if any, petitioner may address whether a  
4 certificate of appealability should issue in the event he elects to file an appeal of the judgment in  
5 this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must  
6 issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

7 DATED: January 31, 2011.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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