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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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LESTER L. TELLIS,

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Petitioner,

3:10-cv-00387-ECR-VPC

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vs.

ORDER

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BILL DONAT, *et al.*,

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Respondents.

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This habeas matter under 28 U.S.C. § 2254 comes before the Court on the petitioner's application (#1) to proceed *in forma pauperis* and for initial review under Rule 4 of the Rules Governing Proceedings under Section 2254. On the application to proceed *in forma pauperis*, the Court finds that petitioner is unable to pay the \$5.00 filing fee, and the application therefore will be granted. On initial review, a substantial question exists as to whether the petition is subject to dismissal because the sole claim presented was not fairly presented to the state courts and exhausted. Petitioner therefore will be directed to show cause in writing why the petition should not be dismissed without prejudice.

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Background

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Petitioner Lester Tellis does not challenge his conviction and sentence but instead challenges the outcome of a prison disciplinary proceeding. According to the papers submitted with the federal petition, the state district court denied the state habeas petition without reaching the merits. The court noted that it had entered an order granting petitioner leave to supplement or amend his petition to allege and provide evidence that he suffered a

1 loss of good time as a result of the disciplinary proceeding. Petitioner filed several motions
2 but did not provide the requested information. The state district court accordingly dismissed
3 the petition, without reaching the merits, because “[w]ithout an adverse impact on a liberty
4 interest, this proceeding merely challenges his condition of confinement, which is not
5 permissible.” The Supreme Court of Nevada affirmed for the reasons stated in the state
6 district court’s order. The remittitur issued on March 2, 2010. See #1-1, at 18-22.

7 On or about June 20, 2010, petitioner mailed the present federal petition to the Clerk
8 of this Court for filing.

9 ***Governing Exhaustion Law***

10 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court
11 remedies on a claim before presenting that claim to the federal courts. To satisfy this
12 exhaustion requirement, the claim must have been fairly presented to the state courts
13 completely through to the highest court available, in this case the Supreme Court of Nevada.
14 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329
15 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific
16 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief
17 on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
18 2000). The exhaustion requirement insures that the state courts, as a matter of federal-state
19 comity, will have the first opportunity to pass upon and correct alleged violations of federal
20 constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct.
21 2546, 2554-55, 115 L.Ed.2d 640 (1991). A petition that is completely unexhausted is subject
22 to immediate dismissal. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006);
23 *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.2001).

24 ***Discussion***

25 On the papers presented, it does not appear that petitioner fairly presented his claims
26 to the state courts for a resolution on the merits. According to the state district court order,
27 petitioner was given an opportunity to present a cognizable state habeas claim for a resolution
28 on the merits by demonstrating that he had been denied good time credits. Yet he failed to

1 do so, and the petition was dismissed without reaching the merits for failure to present a claim
2 cognizable by a state habeas petition, because petitioner did not establish that the outcome
3 of the disciplinary proceeding affected the duration of his confinement. Under established
4 law, presenting a claim in a procedural context in which the merits of the claim will not be
5 considered does not constitute fair presentation of the claim. *See, e.g., Castille v. Peoples*,
6 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989).

7 Petitioner therefore will be required to show cause why the petition should not be
8 dismissed without prejudice for lack of exhaustion.¹

9 IT THEREFORE IS ORDERED that the petitioner's application (#1) to proceed *in forma*
10 *pauperis* is GRANTED, such that petitioner will not be required to pay the \$5.00 filing fee.

11 IT FURTHER IS ORDERED that the Clerk of Court shall file the petition and
12 accompanying motion but shall withhold service at this time.²

13 IT FURTHER IS ORDERED that, within thirty (30) days of entry of this order, petitioner
14 shall SHOW CAUSE in writing why the petition should not be dismissed without prejudice for
15 lack of exhaustion.

16 IT FURTHER IS ORDERED that petitioner shall attach with his response copies of all
17 papers that he filed in the state courts that he contends demonstrate that he fairly presented
18 and exhausted his claim in the state courts. He in particular shall attach copies of all state
19 court filings, if any, demonstrating to the state courts that he was denied good time credits as
20 a result of the disciplinary proceeding.

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22 ¹ It is at least arguable that there would be no federal habeas jurisdiction unless there was a loss of
23 good time credits affecting the duration of petitioner's confinement. However, the issue – as to a federal
24 habeas petition as opposed to a Nevada state habeas petition – is not necessarily wholly free from doubt
25 under federal habeas jurisprudence. Further, petitioner alleges a loss of good time credits at one point on the
26 federal petition form. *See* #1-1, at 2; but cf. *id.* at 3(a), lines 3-4. A federal court has discretion to address
27 other potential non-merits bases for dismissal before addressing subject matter jurisdiction. *See, e.g.,*
Sinochem International Co., Ltd. v. Malaysia International Shipping Corp., 549 U.S. 422, 430-31, 127 S.Ct.
1184, 1191-92, 167 L.Ed.2d 15 (2007). In the present case, the Court finds that the more expedient manner
to proceed is to determine whether petitioner fairly presented his claim for a state court decision on the merits
in the first instance in advance of determining whether federal subject matter jurisdiction is present.

28 ² The filing of the petition does not signify that either the petition or the claim therein otherwise is free
of deficiencies. The Court has not completed screening at this juncture.

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If petitioner does not timely respond to this order, the entire petition will be dismissed without further advance notice. If petitioner responds to this order but fails to demonstrate, with copies of supporting state court filings, that the exhaustion requirement has been satisfied, the petition will be dismissed without prejudice for lack of exhaustion.

The Clerk shall send petitioner a copy of his petition and accompanying papers with this order.

DATED: June 28, 2010



EDWARD C. REED
United States District Judge