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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MIGUEL ALEJANDRO MARTINEZ,
Petitioner,
vs.
JAMES GREG COX, *et al.*,
Respondents.

3:12-cv-00485-LRH-WGC
ORDER

Petitioner Miguel Alejandro Martinez has submitted a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. He has now filed a completed application to proceed *in forma pauperis* (ECF #6), which is granted.

The court ordered petitioner to file an amended caption page naming his immediate custodian as a respondent (ECF #4). Plaintiff filed what he styled a motion for amended caption page and indicated that he included High Desert State Prison Warden Dwight Neven as a respondent (ECF #5). The court deems this sufficient; the Clerk of Court is directed to add Dwight Neven as a respondent in this action.

Next, it appears that this petition may be subject to dismissal without prejudice for failure to exhaust state remedies. A federal court will not grant a state prisoner’s petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains

1 unexhausted until the petitioner has given the highest available state court the opportunity to consider
2 the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d
3 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

4 A habeas petitioner must “present the state courts with the same claim he urges upon the federal
5 court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim,
6 not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*
7 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve
8 exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting claims under the
9 United States Constitution” and given the opportunity to correct alleged violations of the prisoner’s
10 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106
11 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear instruction to
12 potential litigants: before you bring any claims to federal court, be sure that you first have taken each
13 one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S.
14 509, 520 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process, equal
15 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195
16 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that applies
17 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003)
18 (en banc).

19 A claim is not exhausted unless the petitioner has presented to the state court the same operative
20 facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. Of*
21 *Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the
22 petitioner presents to the federal court facts or evidence which place the claim in a significantly different
23 posture than it was in the state courts, or where different facts are presented at the federal level to support
24 the same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v. Sumner*, 688
25 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458 (D. Nev. 1984).

26 Here, petitioner appears to challenge the calculation of his sentence (*see* ECF #1-1). However,
27 he indicates on the face of his petition that he has not filed a direct appeal, nor a state postconviction
28 petition for a writ of habeas corpus. Accordingly, petitioner shall have **thirty (30) days** from the entry

1 of this order to show cause and file such proof he may have to demonstrate that he has exhausted
2 available state remedies.

3 **IT IS THEREFORE ORDERED** that petitioner's application to proceed *in forma pauperis*
4 (ECF #6) is **GRANTED**.

5 **IT IS FURTHER ORDERED** that petitioner's motion for amended caption page (ECF #5) is
6 **GRANTED**.

7 **IT IS FURTHER ORDERED** that the Clerk shall add respondent Dwight Neven to the caption
8 of this case.

9 **IT IS FURTHER ORDERED** that the Clerk shall **DETACH, FILE and**
10 **ELECTRONICALLY SERVE** the petition (ECF #1-1) upon the respondents.

11 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** from the entry of this
12 order to show cause and file such proof he may have to demonstrate that he has exhausted his state
13 remedies.

14 **IT IS FURTHER ORDERED** that if petitioner files such proof, respondents shall have **twenty**
15 **(20) days** to file a response to petitioner's proof.

16 **IT IS FURTHER ORDERED** that if petitioner is unable to demonstrate that he has exhausted
17 his state remedies, the court will enter an order dismissing the petition.

18 DATED this 29th day of November, 2012.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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