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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JORGE GARCIA PICHARDO,

Plaintiff,

vs.

M. STAINER,

Defendant

) Case No.:12-cv-01254-DLB (HC)  
)  
) ORDER TO SHOW CAUSE REGARDING  
) EXHAUSTION OF STATE COURT  
) REMEDIES  
)  
) [Doc. 1]  
)  
)

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Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on April 11, 2012, in the United States District Court for the Central District of California. On July 20, 2012, the petition was transferred to this Court.

Petitioner raises the following three claims in his petition: (1) ineffective assistance of counsel; and (2) the trial court erred in allowing the prosecution to admit evidence of prior uncharged violent conduct. (Pet. at 6, 15-23.)

In reviewing Petitioner’s petition it is not clear what, if any, claims were exhausted in the California Supreme Court.

1 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary  
2 review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it  
3 plainly appears from the face of the petition . . . that the petition is not entitled to relief." Rule 4  
4 of the Rules Governing 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
5 1990).

6  
7 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
8 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
9 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
10 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
11 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.  
12 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

13 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
14 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
15 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,  
16 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair  
17 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's  
18 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal  
19 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).  
20 Additionally, the petitioner must have specifically told the state court that he was raising a  
21 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood,  
22 133 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the trial  
23 court violated his due process rights "he must say so, not only in federal court but in state court."  
24 Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general appeal to a constitutional guarantee is  
25 insufficient to present the "substance" of such a federal claim to a state court. See Anderson v.  
26 Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982) (Exhaustion requirement not satisfied circumstance  
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1 that the "due process ramifications" of an argument might be "self-evident."); Gray v.  
2 Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 1074 (1996) ("a claim for relief in habeas corpus  
3 must include reference to a specific federal constitutional guarantee, as well as a statement of the  
4 facts which entitle the petitioner to relief.").

5  
6 Additionally, the petitioner must have specifically told the state court that he was raising  
7 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,  
8 669 (9th Cir.2000), amended, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th  
9 Cir.1999); Keating v. Hood, 133 F.3d at 1241. In Duncan, the United States Supreme Court  
10 reiterated the rule as follows:

11  
12 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state  
13 remedies requires that petitioners "fairly presen[t]" federal claims to the state courts in  
14 order to give the State the "opportunity to pass upon and correct alleged violations of the  
15 prisoners' federal rights" (some internal quotation marks omitted). If state courts are to  
16 be given the opportunity to correct alleged violations of prisoners' federal rights, they  
17 must surely be alerted to the fact that the prisoners are asserting claims under the United  
18 States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a  
19 state court trial denied him the due process of law guaranteed by the Fourteenth  
20 Amendment, he must say so, not only in federal court, but in state court.

21 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

22  
23 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal  
24 claims in state court unless he specifically indicated to that court that those claims were  
25 based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-988 (9th Cir. 2000).  
26 Since the Supreme Court's decision in Duncan, this court has held that the petitioner  
27 must make the federal basis of the claim explicit either by citing federal law or in the  
28 decisions of federal courts, even if the federal basis is "self-evidence," Gatlin v.  
Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . .  
. (1982), or the underlying claim would be decided under state law on the same  
considerations that would control resolution of the claim on federal grounds. Hiivala v.  
Wood, 195 F.3d at 1106-1107; Johnson v. Zenon, 88 F.3d 828, 830-831 (9th Cir. 1996);  
Crotts, 73 F.3d at 865.

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1 In Johnson, we explained that the petitioner must alert the state court to the fact that the  
2 relevant claim is a federal one without regard to how similar the state and federal  
standards for reviewing the claim may be or how obvious the violation of federal law is.

3 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

4 Because it is unclear what, if any, claims presented in the instant federal petition for writ  
5 of habeas corpus were exhausted in the state's highest court, Petitioner will be ordered to show  
6 cause regarding exhaustion. If Petitioner has not presented all of his claims to the California  
7 Supreme Court, this Court cannot proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1).  
8 However, Petitioner may have presented his claims to the California Supreme Court and  
9 neglected to make it clear. If possible, Petitioner should present to the Court documentary  
10 evidence that the claims were indeed presented to the California Supreme Court.  
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12 Accordingly, it is HEREBY ORDERED that:

13 1. Within thirty (30) days from the date of service of this order, Petitioner shall show  
14 cause as to what claims, if any, were presented to the state's highest court.

15 2. Failure to comply with this order may result in the action be dismissed for failure  
16 to comply with a court order. Local Rule 11-110.  
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19 IT IS SO ORDERED.

20 Dated: August 20, 2012

21 /s/ Dennis L. Beck  
22 UNITED STATES MAGISTRATE JUDGE  
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