



1 years. Petitioner filed neither a direct appeal of his conviction nor a habeas petition in California  
2 State Court.

3 On September 1, 2016, Petitioner filed a habeas petition pursuant to 28 U.S.C. § 2254 in  
4 the Sacramento Division of this Court. The petition was transferred to the Fresno Division on  
5 September 7, 2016.  
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7 **III. Petitioner Has Not Exhausted Claims**

8 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
9 a federal petition for writ of habeas corpus must first exhaust state judicial remedies. 28 U.S.C. §  
10 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court  
11 the initial opportunity to correct the state's alleged constitutional deprivations. *Coleman v.*  
12 *Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*,  
13 854 F.2d 1158, 1163 (9<sup>th</sup> Cir. 1988).  
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15 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
16 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
17 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971);  
18 *Johnson v. Zenon*, 88 F.3d 828, 829 (9<sup>th</sup> Cir. 1996). A federal court will find that the highest state  
19 court was given a full and fair opportunity to hear a claim if the petitioner has presented the  
20 highest state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365.  
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22 The petitioner must also have specifically informed the state court that he was raising a  
23 federal constitutional claim. *Duncan*, 513 U.S. at 365-66; *Lyons v. Crawford*, 232 F.3d 666, 669  
24 (9<sup>th</sup> Cir. 2000), *amended*, 247 F.3d 904 (2001); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.  
25 1999); *Keating v. Hood*, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir. 1998).

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1 In this case, Petitioner has not yet pursued any state remedy. Accordingly, the Court must  
2 dismiss the petition. 28 U.S.C. § 2254(b)(1); *Rose*, 455 U.S. at 521-22.<sup>1</sup>

3 **IV. Certificate of Appealability**

4 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
5 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*  
6 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a  
7 certificate of appealability is 28 U.S.C. § 2253, which provides:

9 (a) In a habeas corpus proceeding or a proceeding under section 2255  
10 before a district judge, the final order shall be subject to review, on appeal, by  
11 the court of appeals for the circuit in which the proceeding is held.

12 (b) There shall be no right of appeal from a final order in a proceeding  
13 to test the validity of a warrant to remove to another district or place for  
14 commitment or trial a person charged with a criminal offense against the  
15 United States, or to test the validity of such person's detention pending  
16 removal proceedings.

17 (c) (1) Unless a circuit justice or judge issues a certificate of  
18 appealability, an appeal may not be taken to the court of appeals from—

19 (A) the final order in a habeas corpus proceeding in which the  
20 detention complained of arises out of process issued by a State court; or

21 (B) the final order in a proceeding under section 2255.

22 (2) A certificate of appealability may issue under paragraph (1)  
23 only if the applicant has made a substantial showing of the denial of a  
24 constitutional right.

25 (3) The certificate of appealability under paragraph (1) shall  
26 indicate which specific issues or issues satisfy the showing required by  
27 paragraph (2).

28 If a court denies a habeas petition, the court may only issue a certificate of appealability  
"if jurists of reason could disagree with the district court's resolution of his constitutional claims  
or that jurists could conclude the issues presented are adequate to deserve encouragement to

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<sup>1</sup> The petition presents multiple other deficiencies that would require amendment if the petition were exhausted. In the absence of exhaustion, the Court declines to address those deficiencies.

1 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

2 Although the petitioner is not required to prove the merits of his case, he must demonstrate  
3 "something more than the absence of frivolity or the existence of mere good faith on his . . .  
4 part." *Miller-El*, 537 U.S. at 338.

5 Reasonable jurists would not find the Court's determination that Petitioner is not entitled  
6 to pursue federal habeas corpus relief debatable, wrong, or deserving of encouragement to  
7 proceed further. Accordingly, the Court declines to issue a certificate of appealability.

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9 **V. Conclusion and Recommendation**

10 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus  
11 without prejudice and decline to issue a certificate of appealability.

12 These Findings and Recommendations will be submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**  
14 **(30) days** after being served with these Findings and Recommendations, Petitioner may file  
15 written objections with the Court. The document should be captioned "Objections to Magistrate  
16 Judge's Findings and Recommendations." Petitioner is advised that failure to file objections  
17 within the specified time may constitute waiver of the right to appeal the District Court's order.  
18 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d  
19 1391, 1394 (9th Cir. 1991)).  
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23 IT IS SO ORDERED.

24 Dated: **October 21, 2016**

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE