

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

11 MANUEL DE JESUS IBANEZ, ) 1:10-cv-00537-JLT HC  
12 Petitioner, )  
13 v. ) ORDER DISMISSING PETITION FOR  
14 PEOPLE OF THE STATE OF ) WRIT OF HABEAS CORPUS AS  
CALIFORNIA, ) UNEXHAUSTED (Doc. 1)  
15 )  
16 Respondent. ) ORDER DIRECTING CLERK OF COURT  
17 ) TO ENTER JUDGMENT AND CLOSE  
FILE  
 ) ORDER DECLINING TO ISSUE A  
CERTIFICATE OF APPEALABILITY

18 Petitioner is a state prisoner proceeding pro se on a petition for writ of habeas corpus  
19 pursuant to 28 U.S.C. § 2254.

20 The instant petition was filed on March 5, 2010 in the Sacramento Division of this Court.  
21 (Doc. 1). On March 26, 2010, the case was transferred to the Fresno Division. (Doc. 6). On March  
22 17, 2010, Petitioner filed his written consent to the jurisdiction of the United States Magistrate  
23 Judge for all purposes. (Doc. 5). The petition alleges four claims: (1) his conviction was obtained  
24 through an involuntary guilty plea because he was not advised of the immigration consequences of  
25 his plea of guilty; (2) the conviction was unconstitutional because the prosecutor failed to disclose  
26 evidence favorable to Petitioner; (3) the conviction was obtained through a violation of Petitioner's  
27 right against self-incrimination; and (4) the conviction was obtained with the use of unlawfully  
28 obtained evidence. (Doc. 1, pp. ).

## DISCUSSION

#### A. Procedural Grounds for Motion to Dismiss

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
4 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
5 petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section  
6 2254 Cases. The Court has conducted a preliminary review of the petition and has determined that  
7 the claims in the petition are unexhausted. Therefore, the petition must be dismissed.

## B. Exhaustion.

9 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
10 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
11 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
12 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
13 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,  
14 1163 (9th Cir. 1988).

15 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
16 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.  
17 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88  
18 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full  
19 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the  
20 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504  
21 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

22 Additionally, the petitioner must have specifically told 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 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.  
25 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States  
26 Supreme Court reiterated the rule as follows:

27        In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state  
28        remedies requires that petitioners “fairly presen[t]” federal claims to the state courts in order  
          to give the State the “opportunity to pass upon and correct alleged violations of the prisoners’  
          federal rights” (some internal quotation marks omitted). If state courts are to be given the

1 opportunity to correct alleged violations of prisoners' federal rights, they must surely be  
2 alerted to the fact that the prisoners are asserting claims under the United States Constitution.  
3 If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied  
him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not  
only in federal court, but in state court.

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

5 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his  
6 federal claims in state court *unless he specifically indicated to that court that those claims*  
*were based on federal law.* See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000).  
7 Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must*  
*make the federal basis of the claim explicit either by citing federal law or the decisions of*  
*federal courts, even if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882,  
8 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying  
9 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 1098, 1106-07 (9th Cir.  
10 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . . .

11 In Johnson, we explained that the petitioner must alert the state court to the fact that  
12 the 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.

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

14 In the petition, Petitioner alleges that he was convicted in the Fresno County Superior Court  
15 on January 26, 2009, after pleading guilty to charges of first degree residential burglary, assault, and  
16 resisting arrest. (Doc. 1, p. 1). Petitioner indicates that he did not appeal his conviction. (Id.).  
17 Petitioner also avers that he has not filed any petitions, applications, or motions with respect to his  
18 conviction in any court. (Doc. 1, p. 2g).

19 From the foregoing, the Court concludes that Petitioner has not presented any of his claims to  
20 the California Supreme Court as required by the exhaustion doctrine. Because Petitioner has not  
21 presented his claims for federal relief to the California Supreme Court, the Court must dismiss the  
22 petition. See Calderon v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc);  
23 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition  
24 that is entirely unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Calderon, 107 F.3d at  
25 760.

26 Moreover, the Court declines to issue a certificate of appealability. The requirement that a  
27 petitioner seek a certificate of appealability is a gate-keeping mechanism that protects the Court of  
28 Appeals from having to devote resources to frivolous issues, while at the same time affording

1 petitioners an opportunity to persuade the Court that, through full briefing and argument, the  
2 potential merit of claims may appear. Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000).  
3 However, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
4 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
5 El v. Cockrell, 537 U.S. 322, 335-336 (2003). The controlling statute, 28 U.S.C. § 2253, provides as  
6 follows:

7 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,  
8 the final order shall be subject to review, on appeal, by the court of appeals for the circuit in  
which the proceeding is held.  
9 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a  
10 warrant to remove to another district or place for commitment or trial a person charged with a  
criminal offense against the United States, or to test the validity of such person's detention  
pending removal proceedings.  
11 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not  
be taken to the court of appeals from--  
12 (A) the final order in a habeas corpus proceeding in which the detention  
complained of arises out of process issued by a State court; or  
13 (B) the final order in a proceeding under section 2255.  
14 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made  
a substantial showing of the denial of a constitutional right.  
15 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or  
issues satisfy the showing required by paragraph (2).

16 Accordingly, final orders issued by a federal district court in habeas corpus proceedings are  
17 reviewable by the circuit court of appeals, and, in order to have final orders reviewed, a petitioner  
18 must obtain a certificate of appealability. 28 U.S.C. § 2253. This Court will issue a certificate of  
19 appealability when a petitioner makes a substantial showing of the denial of a constitutional right.  
20 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that  
21 "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been  
22 resolved in a different manner or that the issues presented were 'adequate to deserve encouragement  
23 to proceed further'." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting Barefoot v. Estelle*, 463  
24 U.S. 880, 893 (1983)).

25 In the present case, the Court finds that Petitioner has not made the required substantial  
26 showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.  
27 Reasonable jurists would not find it debatable that Petitioner has failed to show an entitlement to  
28 federal habeas corpus relief. Accordingly, the Court hereby DECLINES to issue a certificate of

1 appealability.

2 **ORDER**

3 In light of the foregoing, the Court HEREBY ORDERS as follows:

4 1. The petition for writ of habeas corpus (Doc. 1), is DISMISSED;

5 2. The Clerk of the Court is DIRECTED to enter judgment and close the file; and,

6 3. The Court DECLINES to issue a certificate of appealability.

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8 IT IS SO ORDERED.

9 Dated: April 7, 2010

/s/ **Jennifer L. Thurston**

UNITED STATES MAGISTRATE JUDGE

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