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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JORGE RUIZ,  
Petitioner,  
v.  
FRESNO SUPERIOR COURT,  
Respondent.

Case No. 1:14-cv-00112-LJO-GSA-HC  
FINDINGS AND RECOMMENDATION

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

On January 27, 2014, Petitioner filed the instant petition for writ of habeas corpus. He challenges a 2013 conviction sustained in Fresno County Superior Court for petty theft with a prior.

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

A petitioner who is in state custody and wishes to collaterally challenge his conviction by

1 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
2 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
3 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
4 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,  
5 1163 (9th Cir. 1988).

6 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
7 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
8 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);  
9 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest  
10 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the  
11 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);  
12 Kenney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992) (factual basis).

13 Additionally, the petitioner must have specifically told the state court that he was raising  
14 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,  
15 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th  
16 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States  
17 Supreme Court reiterated the rule as follows:

18 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of  
19 state remedies requires that petitioners "fairly presen[t]" federal claims to the state  
20 courts in order to give the State the "opportunity to pass upon and correct alleged  
21 violations of the prisoners' federal rights" (some internal quotation marks  
22 omitted). If state courts are to be given the opportunity to correct alleged  
23 violations of prisoners' federal rights, they must surely be alerted to the fact that  
the prisoners are asserting claims under the United States Constitution. 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.

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

25 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his  
26 federal claims in state court unless he specifically indicated to that court that those  
27 claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88  
28 (9th Cir. 2000). 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, 889 (9th Cir. 1999) (citing Anderson

1 v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided  
2 under state law on the same considerations that would control resolution of the  
3 claim on federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir.  
4 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . . .

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

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

10 In the instant petition, Petitioner states he has not sought review for his claims in the  
11 California Supreme Court. Therefore, the petition is unexhausted and must be dismissed. 28  
12 U.S.C. § 2254(b)(1).

13 **RECOMMENDATION**

14 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas  
15 corpus be DISMISSED without prejudice for failure to exhaust state remedies.

16 This Findings and Recommendation is submitted to the Honorable Lawrence J. O’Neill,  
17 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B)  
18 and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District  
19 of California.

20 Within thirty (30) days after being served with a copy, Petitioner may file written  
21 objections with the Court. Such a document should be captioned “Objections to Magistrate  
22 Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s  
23 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections  
24 within the specified time may waive the right to appeal the District Court’s order. Martinez v.  
25 Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 IT IS SO ORDERED.

27 Dated: May 20, 2014

28 /s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE