

1 affirmed the convictions and judgment. (LD 3).

2 On June 11, 2013, Petitioner filed a petition for review in the California Supreme Court.
3 (LD 4). On August 14, 2013, the California Supreme Court denied the petition for review. (LD
4 5). Petitioner has not filed any habeas petitions in state court.

5 On August 13, 2014, Petitioner filed the instant petition for writ of habeas corpus. He
6 raises the following three claims in his federal petition: 1) Prosecution's destruction of the photo
7 line-up, which was exculpatory evidence, violated his due process rights; 2) Prosecution's
8 improper use of recorded and transcribed jail house informant audio violated his rights; and 3)
9 DNA testing was negative for Petitioner's DNA on the bag of marijuana and the fence, so the
10 DNA testing did not establish that Petitioner was involved in the crimes.

11 On January 16, 2015, Respondent filed a motion to dismiss because Petitioner has not
12 exhausted his second and third claims. (ECF No. 15). Petitioner did not file an opposition or
13 statement of non-opposition to Respondent's motion to dismiss.

14 II.

15 DISCUSSION

16 Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a
17 preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition
18 "[i]f it plainly appears from the face of the petition...that the petition is not entitled to relief."
19 Rule 4 of the Rules Governing 2254 Cases. The Advisory Committee Notes to Rule 8 indicate
20 that the Court may dismiss a petition for writ of habeas corpus, either on its own motion under
21 Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been
22 filed.

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

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

8 Additionally, the petitioner must have specifically told the state court that he was raising
9 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
10 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001). In Duncan, the United States Supreme Court
11 reiterated the rule as follows:

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

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

23 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his
24 federal claims in state court unless he specifically indicated to that court that those
25 claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88
26 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held
27 that the petitioner must make the federal basis of the claim explicit either by citing
28 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
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. Hiiivala v. Wood, 195 F3d 1098, 1106-07 (9th Cir.
1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

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

Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000).

Respondent argues in his motion to dismiss that claims two and three of Petitioner's

1 federal petition are unexhausted because the claims have not been presented to the California
2 Supreme Court. Respondent concedes that claim one of the federal petition is exhausted because
3 Petitioner raised this issue in his petition for review to the California Supreme Court. Upon a
4 review of the record, the court notes that Petitioner has not filed any state habeas petitions.
5 Petitioner filed a petition for review in the California Supreme Court, which included his claim
6 that the prosecution's destruction of the photo line-up violated his due process rights.
7 Petitioner's second and third claims of his federal petition were not raised in the petition for
8 review to the California Supreme Court. Therefore, Petitioner's first claim is exhausted, and he
9 is able to proceed on his first claim. However, Petitioner's other claims have not been presented
10 to the California Supreme Court, and therefore, they are unexhausted.

11 Therefore, the petition contains unexhausted and exhausted claims, and it is a mixed
12 petition. See Rose, 455 U.S. at 520-22. The Court must dismiss a mixed petition without
13 prejudice to give a petitioner an opportunity to exhaust the claims if he can do so. See Id. at 521-
14 22. However, if a petition contains unexhausted claims, a petitioner may, at his option, withdraw
15 the unexhausted claims and go forward with the exhausted claims. See Anthony v. Cambra, 236
16 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict courts must provide habeas litigants with the
17 opportunity to amend their mixed petitions by striking unexhausted claims as an alternative to
18 suffering dismissal.”).

19 III.

20 RECOMMENDATION

21 Accordingly, the Court RECOMMENDS that Respondent's motion to dismiss be
22 GRANTED and the petition for writ of habeas corpus be DISMISSED without prejudice.

23 Petitioner may, at his option, move to withdraw the unexhausted claims within thirty (30)
24 days of the date of service of this Findings and Recommendation. If Petitioner fails to withdraw
25 the unexhausted claims within the thirty (30) day time frame, the Findings and Recommendation
26 will be submitted to the District Judge for dismissal of the petition. See Rose, 455 U.S. at 520.

27 Within thirty (30) days after the date of service of this Findings and Recommendation,
28 any party may file written objections with the Court and serve a copy on all parties. Such a

1 document should be captioned “Objections to Magistrate Judge’s Findings and
2 Recommendation.” Replies to the Objections shall be served and filed within fourteen (14) days
3 after service of the Objections.

4 Provided Petitioner does not move to withdraw the unexhausted claims, the Finding and
5 Recommendation will then be submitted to the assigned District Judge for review of the
6 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(c) and Rule 304 of the Local Rules
7 of Practice for the United States District Court, Eastern District of California. The parties are
8 advised that failure to file objections within the specified time may waive the right to appeal the
9 Order of the District Court. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing
10 Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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12
13 IT IS SO ORDERED.

14 Dated: March 3, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE