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

BARRY FRANK WILSON,)	Case No.: 1:14-cv-01446-JLT
Petitioner,)	
v.)	FINDINGS AND RECOMMENDATION TO
)	DISMISS THE PETITION FOR LACK OF
)	EXHAUSTION
SUPERIOR COURT OF CALIFORNIA,)	
Respondent.)	ORDER DIRECTING THAT OBJECTIONS BE
)	FILED WITHIN TWENTY-ONE DAYS
)	
)	ORDER DIRECTING CLERK OF THE COURT TO
)	ASSIGN DISTRICT JUDGE TO CASE

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

The instant petition was filed on September 12, 2014. (Doc. 1). A preliminary review of the petition, however, revealed that the petition appears to contain only claims that have not been exhausted in state court. Accordingly, on September 30, 2014, the Court issued an Order to Show Cause requiring Petitioner to file a response within thirty days showing why the petition should not be dismissed for lack of exhaustion. (Doc. 4). On October 28, 2014, Petitioner filed his response. (Doc. 5). In the response, Petitioner does not address the exhaustion issue, but instead he asserts that only God has jurisdiction over him and that the Court will suffer God’s wrath if it does not correct the state

1 court's purportedly erroneous assertion of jurisdiction over him. (Id.).

2 DISCUSSION

3 A. Preliminary Review of Petition.

4 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
5 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
6 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The
7 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas
8 corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after
9 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

10 B. Exhaustion.

11 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
12 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
13 exhaustion doctrine is based on comity to the state court and gives the state court the initial
14 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
15 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163
16 (9th Cir. 1988).

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

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

1 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state remedies
2 requires that petitioners “fairly present[]” federal claims to the state courts in order to give the
3 State the “opportunity to pass upon and correct alleged violations of the prisoners' federal
4 rights” (some internal quotation marks omitted). If state courts are to be given the opportunity
5 to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact
6 that the prisoners are asserting claims under the United States Constitution. If a habeas
7 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due
8 process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal
9 court, but in state court.

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

7 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal
8 claims in state court *unless he specifically indicated to that court that those claims were based*
9 *on federal law*. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the
10 Supreme Court's decision in Duncan, this court has held that the *petitioner must make the*
11 *federal basis of the claim explicit either by citing federal law or the decisions of federal courts,*
12 *even if the federal basis is “self-evident,”* Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999)
13 (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
14 decided under state law on the same considerations that would control resolution of the claim
15 on federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v.
16 Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

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

20 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), as amended by Lyons v.
21 Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).

22 Where none of a petitioner's claims has been presented to the highest state court as required by
23 the exhaustion doctrine, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154
24 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The authority of a court to hold a
25 mixed petition in abeyance pending exhaustion of the unexhausted claims has not been extended to
26 petitions that contain no exhausted claims. Raspberry, 448 F.3d at 1154.

27 Here, the petition alleges that Petitioner is now charged with an unspecified violation of
28 California's Vehicle Code in the Superior Court of California, County of Tuolumne, Traffic Division.
(Doc. 1, p. 1). Petitioner challenges the state court's authority to regulate his freedom to travel and
move about. Nowhere in his petition does Petitioner indicate that the state court has convicted him of
any offense; to the contrary, it appears that Petitioner's case is still pending in the Superior Court.

Nowhere does Petitioner allege that he has ever presented his claims to the California Supreme Court.

As mentioned, in Petitioner's response to the Order to Show Cause, he does not challenge the

1 Court's conclusion that his claims are unexhausted, nor does he address exhaustion in any way.
2 Instead, Petitioner asserts that he is a member of the Kingdom of God and that only God has
3 jurisdiction over him.

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

10 **ORDER**

11 For the foregoing reasons, the Court HEREBY DIRECTS the Clerk of the Court to assign a
12 United States District Judge to this case.

13 **RECOMMENDATION**

14 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas corpus
15 be DISMISSED for lack of exhaustion.

16 This Findings and Recommendation is submitted to the United States District Court Judge
17 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
18 Rules of Practice for the United States District Court, Eastern District of California. Within 21 days
19 after being served with a copy of this Findings and Recommendation, any party may file written
20 objections with the Court and serve a copy on all parties. Such a document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be
22 served and filed within ten court days after service of the Objections. The Court will then review the
23 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).

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The parties are advised that failure to file objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: November 10, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE