



1 **II. Exhaustion.**

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

7 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
8 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.  
9 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88  
10 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and  
11 fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's  
12 factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1,  
13 112 S.Ct. 1715, 1719 (1992) (factual basis).

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

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

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

Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his 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). 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 v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be

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

3 In Johnson, we explained that the petitioner must alert the state court to the fact that the  
4 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.

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

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

12 Here, Petitioner has alleged that he appeared in the Fresno County Superior Court on  
13 September 8, 2015 for a hearing on a violation of parole, that Petitioner pleaded no contest to having  
14 violated his parole, and was sentenced to an additional two years in prison. (Doc. 1, p. 1). Petitioner  
15 alleges that he did not appeal the parole violation and has not pursued any other remedies in the state  
16 courts related to this event.

17 From the foregoing, it appears that Petitioner has not presented any of his claims to the  
18 California Supreme Court as required by the exhaustion doctrine. Because Petitioner has not  
19 presented his claims for federal relief to the California Supreme Court, the Court must dismiss the  
20 petition. See Calderon v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc);  
21 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition that  
22 is entirely unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Calderon, 107 F.3d at 760.  
23 However, it is possible that Petitioner has exhausted his claims and simply failed to provide the Court  
24 with the documents and information that would establish such exhaustion. Accordingly, Petitioner  
25 will be permitted thirty days within which to respond to this Order To Show Cause by filing a  
26 response containing evidence that the claims herein are indeed exhausted.

27 **ORDER**

28 For the foregoing reasons, the Court HEREBY ORDERS as follows:

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1. Petitioner is ORDERED TO SHOW CAUSE **within 30 days** why the Petition should not be dismissed for failure to exhaust remedies in state court.

**Petitioner is forewarned that his failure to comply with this order may result in a Recommendation that the Petition be dismissed pursuant to Local Rule 110.**

IT IS SO ORDERED.

Dated: October 28, 2015

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE