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

MONICO J. QUIROGA, III,)	Case No.: 1:16-cv-01246-AWI-JLT (HC)
Petitioner,)	
v.)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS PETITION FOR FAILURE TO
STATE OF CALIFORNIA,)	EXHAUST STATE REMEDIES (Doc. 1)
Respondent.)	
)	[TWENTY-ONE DAY DEADLINE]
)	
)	

Petitioner is serving an 11-year term on a conviction imposed in the Kern County Superior Court for intimidation and stalking. In this action, Petitioner raises numerous claims concerning his 2016 conviction; however, he concedes that his claims are currently pending in the California Court of Appeal. Therefore, the Court will recommend that the petition be dismissed for failure to exhaust state remedies.

I. DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after

1 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

2 **B. Exhaustion**

3 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
4 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
5 exhaustion doctrine is based on comity to the state court and gives the state court the initial
6 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
7 722, 731 (1991).

8 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
9 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
10 Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full
11 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
12 claim's factual and legal basis. Id. (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1 (1992) (factual
13 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. In Duncan, the United States Supreme
16 Court reiterated the rule as follows:

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

26 Id. The Ninth Circuit examined the rule further, stating:

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

1 In Johnson, we explained that the petitioner must alert the state court to the fact that the
2 relevant claim is a federal one without regard to how similar the state and federal standards for
3 reviewing the claim may be or how obvious the violation of federal law is.
4 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), as amended by Lyons v.
5 Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001). Where none of a petitioner's claims have been
6 presented to the highest state court as required by the exhaustion doctrine, the Court must dismiss the
7 petition. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). The authority of a court to hold a
8 mixed petition in abeyance pending exhaustion of the unexhausted claims has not been extended to
9 petitions that contain no exhausted claims. Id.

10 Here, Petitioner states his claims are currently pending before the California Court of Appeal,
11 Fifth Appellate District. Because Petitioner has not presented his claims for federal relief to the
12 California Supreme Court, the Court must dismiss the petition. See Calderon v. United States Dist.
13 Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc). The Court cannot consider a petition that is
14 entirely unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

14 **II. RECOMMENDATION**

15 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be
16 DISMISSED WITHOUT PREJUDICE for failure to exhaust state remedies.

17 This Findings and Recommendation is submitted to the United States District Court Judge
18 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
19 Local Rules of Practice for the United States District Court, Eastern District of California. Within
20 twenty-one days after being served with a copy, Petitioner may file written objections with the Court.
21 Such a document should be captioned "Objections to Magistrate Judge's Findings and
22 Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C.
23 § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the specified time may
24 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25
26 IT IS SO ORDERED.

27 Dated: September 12, 2016

/s/ Jennifer L. Thurston
28 UNITED STATES MAGISTRATE JUDGE