



1 Cir.2001).

2 B. Exhaustion

3 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
4 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
5 The 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  
7 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

8 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
9 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
10 Duncan v. Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court  
11 was given a full and fair opportunity to hear a claim if the petitioner has presented the highest  
12 state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney  
13 v. Tamayo-Reyes, 504 U.S. 1, 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. 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  
18 remedies requires that petitioners “fairly presen[t]” federal claims to the state  
19 courts in order to give the State the “opportunity to pass upon and correct alleged  
20 violations of the prisoners' federal rights” (some internal quotation marks omitted).  
21 If state courts are to be given the opportunity to correct alleged violations of  
22 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.

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

24 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his  
25 federal claims in state court *unless he specifically indicated to that court that those*  
26 *claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88*  
27 *(9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held*  
28 *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 decided under*  
*state law on the same considerations that would control resolution of the claim on*

1 federal grounds. Hivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999);  
2 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  
4 that the relevant claim is a federal one without regard to how similar the state and  
5 federal standards for reviewing the claim may be or how obvious the violation of  
6 federal law is.

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

9 Petitioner states he is still undergoing a re-appeal of his conviction in the California Court  
10 of Appeal, Fifth Appellate District, and he states his claims are currently pending review by the  
11 state court. Because it appears Petitioner has not presented his claims for federal relief to the  
12 California Supreme Court, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d  
13 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot  
14 consider a petition that is unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

15 **ORDER**

16 Accordingly, **within 21 days**, Petitioner is **ORDERED** to show cause why the petition  
17 should not be dismissed for failure to exhaust state remedies.

18 IT IS SO ORDERED.

19 Dated: **March 2, 2017**

20 **/s/ Jennifer L. Thurston**  
21 UNITED STATES MAGISTRATE JUDGE