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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 LYNELL TRAVON LEWIS,

12 Petitioner,

13 v.

14 CDCR,

15 Respondent.
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No. 1:17-cv-00208-JLT (HC)

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE**

**FINDINGS AND RECOMMENDATION
TO DISMISS UNEXHAUSTED PETITION
WITHOUT PREJUDICE**

**[TWENTY-ONE DAY OBJECTION
DEADLINE]**

18 Petitioner filed a habeas petition on February 13, 2017, challenging his 2012 conviction in
19 Kern County Superior Court of multiple gang-related crimes. The Court conducted a preliminary
20 review of the petition and determined the petition appeared to be unexhausted. Petitioner was
21 ordered to show cause why the petition should not be dismissed for failure to exhaust state
22 remedies. Petitioner responded to the order on March 15, 2017. Based on his representations, the
23 Court concludes the instant petition is unexhausted and will therefore recommend it be dismissed
24 without prejudice to refiling once state remedies have been exhausted.

25 **DISCUSSION**

26 A. Screening of Petition

27 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
28 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not

1 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
2 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
3 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to
4 dismiss, or after an answer to the petition has been filed. *Herbst v. Cook*, 260 F.3d 1039 (9th
5 Cir.2001).

6 B. Exhaustion

7 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
8 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
9 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
10 opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501
11 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

12 A petitioner can satisfy the exhaustion requirement by providing the highest state court
13 with a full and fair opportunity to consider each claim before presenting it to the federal court.
14 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court
15 was given a full and fair opportunity to hear a claim if the petitioner has presented the highest
16 state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365 (legal basis); *Kenney*
17 *v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

18 Additionally, the petitioner must have specifically told the state court that he was raising a
19 federal constitutional claim. *Duncan*, 513 U.S. at 365-66. In *Duncan*, the United States Supreme
20 Court reiterated the rule as follows:

21 In *Picard v. Connor*, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
22 remedies requires that petitioners “fairly presen[t]” federal claims to the state
23 courts in order to give the State the “opportunity to pass upon and correct alleged
24 violations of the prisoners' federal rights” (some internal quotation marks omitted).
25 If state courts are to be given the opportunity to correct alleged violations of
26 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.

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

28 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his

1 federal claims in state court *unless he specifically indicated to that court that those*
2 *claims were based on federal law.* See Shumway v. Payne, 223 F.3d 982, 987-88
3 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held
4 that the *petitioner must make the federal basis of the claim explicit either by citing*
5 *federal law or the decisions of federal courts, even if the federal basis is "self-*
6 *evident,"* Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
7 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under
8 state law on the same considerations that would control resolution of the claim on
9 federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999);
10 Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . .

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

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

17 Petitioner was convicted of multiple gang-related offenses on January 19, 2012. He
18 appealed to the California Court of Appeal. On October 15, 2015, the appellate court reversed
19 and remanded the case to the trial court. People v. Bell, 241 Cal.App.4th 315 (2015). Petitioner
20 filed a petition for review on the issue of whether a denial of a venue-change violated his due
21 process rights to an impartial jury under the Fifth, Sixth and Fourteenth Amendments of the
22 Constitution. Review was denied on January 27, 2016. Petitioner states he is presently in the
23 process of appealing again to the state appellate court following remand to the trial court.

24 The instant petition presents two claims for relief: 1) Petitioner alleges he was denied the
25 right a jury trial of a once-in-jeopardy plea; and 2) Petitioner was denied a change in venue in
26 violation of his due process rights; and 3) Petitioner was denied a bail hearing in violation of his
27 rights. Since ground two is the only ground that has been presented to the California Supreme
28 Court, the petition is a mixed petition containing exhausted and unexhausted claims. The Court
will recommend the petition be dismissed without prejudice to refile once Petitioner exhausts
the state remedies. The Court will also recommend that Petitioner be granted leave to withdraw
his unexhausted claims and proceed solely on his exhausted claim.

ORDER

IT IS HEREBY ORDERED that the Clerk of Court is DIRECTED to assign a District
Judge to the case.

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

Dated: **March 19, 2017**

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