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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GILIBALDO DELTORO,  
Petitioner,  
v.  
PEOPLE OF THE STATE OF  
CALIFORNIA,  
Respondent.

Case No. 1:17-cv-01283-MJS (HC)  
**ORDER FOR CLERK TO RANDOMLY  
ASSIGN MATTER TO A DISTRICT JUDGE**  
**FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR FAILURE TO  
EXHAUST STATE REMEDIES**  
**(ECF No. 1)**  
**FOURTEEN (14) DAY DEADLINE**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a March 8, 2017 judgment of the Tuolumne County Superior Court. He states that his appeal to the California Fifth District Court of Appeal remains pending. (ECF No. 1 at 5.) Petitioner does not indicate that he has pursued any other review of his conviction or presented his claims to the California Supreme Court. It thus appearing that Petitioner failed to exhaust state remedies before bringing this petition, the undersigned ordered Petitioner to show cause why his action should not be dismissed. (ECF No. 4.) Petitioner did not respond and the

1 time for doing so has passed. Accordingly, the undersigned will recommend dismissal of  
2 the action.

3 **I. Exhaustion Requirement**

4 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a  
5 preliminary review of each petition for writ of habeas corpus. The Court must dismiss a  
6 petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to  
7 relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d  
8 490 (9th Cir. 1990). Otherwise, the Court will order Respondent to respond to the  
9 petition. Rule 5 of the Rules Governing § 2254 Cases.

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

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

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

1 Duncan, the United States Supreme Court reiterated the rule as follows:

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

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

9 Our rule is that a state prisoner has not "fairly presented" (and thus  
10 exhausted) his federal claims in state court unless he specifically indicated  
11 to that court that those claims were based on federal law. See Shumway  
12 v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme  
13 Court's decision in Duncan, this court has held that the petitioner must  
14 make the federal basis of the claim explicit either by citing federal law or  
15 the decisions of federal courts, even if the federal basis is "self-evident,"  
16 Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.  
17 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be  
18 decided under state law on the same considerations that would control  
19 resolution of the claim on federal grounds. Hiivala v. Wood, 195 F3d 1098,  
20 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir.  
21 1996); . . . .

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

19 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000).

20 Upon review of the instant petition for writ of habeas corpus, it appears that  
21 Petitioner has not presented his claims to the highest state court, the California Supreme  
22 Court. Petitioner was afforded the opportunity to provide additional information in this  
23 regard, but failed to do so. Because the claims have not been presented to the state's  
24 highest court, the Court is unable to proceed to the merits of the petition. 28 U.S.C.  
25 § 2254(b)(1).

## 26 **II. Recommendation**

27 It is HEREBY RECOMMENDED that the petition be dismissed without prejudice  
28 for failure to exhaust state remedies.

1           The findings and recommendations are submitted to the United States District  
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
3 **thirty** (30) days after being served with the findings and recommendations, any party  
4 may file written objections with the Court and serve a copy on all parties. Such a  
5 document should be captioned “Objections to Magistrate Judge’s Findings and  
6 Recommendations.” Any reply to the objections shall be served and filed within fourteen  
7 (14) days after service of the objections. The parties are advised that failure to file  
8 objections within the specified time may result in the waiver of rights on appeal.  
9 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
10 F.2d 1391, 1394 (9th Cir. 1991)).

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12 IT IS SO ORDERED.

13 Dated: November 13, 2017

*/s/ Michael J. Seng*  
14 UNITED STATES MAGISTRATE JUDGE  
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