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8	UNITED STATES DISTRICT COURT	
9	EASTERN DIST	RICT OF CALIFORNIA
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11	ROBERTO CISNEROS MORENO,	No. 1:17-cv-01306-JLT (HC)
12	Petitioner,	ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED
13	V.	FOR FAILURE TO EXHAUST STATE REMEDIES
14	SCOTT FRAUENHEIM, Warden,	TWENTY-ONE DAY DEADLINE
15	Respondent.	[IWENTI-ONE DAT DEADLINE]
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17	Petitioner filed a habeas petition on October 2, 2017, challenging his 2012 conviction in	
18	Tulare County Superior Court of multiple sex offenses. The petition appears to be unexhausted;	
19	therefore, Petitioner will be ordered to show	cause why it should not be dismissed without
20	prejudice.	
21	DIS	SCUSSION
22	A. Preliminary Review of Petition	
23	Rule 4 of the Rules Governing Sectio	n 2254 Cases allows a district court to dismiss a
24	petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not	
25	entitled to relief in the district court" Ru	le 4 of the Rules Governing Section 2254 Cases.
26	The Advisory Committee Notes to Rule 8 inc	licate that the court may dismiss a petition for writ of
27	habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to	
28	dismiss, or after an answer to the petition has	been filed. Herbst v. Cook, 260 F.3d 1039 (9th
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1 Cir.2001).

2 <u>B.</u> 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); <u>Rose v. Lundy</u> , 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. <u>Duncan</u> , 513 U.S. at 365-66. In <u>Duncan</u> , the United States Supreme
16	Court reiterated the rule as follows:
17	In <u>Picard v. Connor</u> , 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 courts in order to give the State the "opportunity to pass upon and correct alleged
19	violations of the prisoners' federal rights" (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of
20	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
21	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
22	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 claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88
26	(9th Cir. 2000). Since the Supreme Court's decision in <u>Duncan</u> , this court has held that the <i>petitioner must make the federal basis of the claim explicit either by citing</i>
27	federal law or the decisions of federal courts, even if the federal basis is "self- evident," <u>Gatlin v. Madding</u> , 189 F.3d 882, 889 (9th Cir. 1999) (citing <u>Anderson v.</u>
28	<u>Harles</u> s, 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
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1	federal grounds. <u>Hiivala v. Wood</u> , 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);	
2 3	In <u>Johnson</u> , we explained that the petitioner must alert the state court to the fact that the relevant claim is a federal one without regard to how similar the state and	
3 4	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	
6	v. Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).	
7	Petitioner brings one claim of ineffective assistance of counsel. He states he filed an	
8	appeal in the California Court of Appeal, but that appeal challenged a restitution fine and an	
9	incorrect abstract of judgment. It appears he has not filed any other state court actions. Because	
10	it appears Petitioner has not presented his claims for federal relief to the California Supreme	
11	Court, the Court must dismiss the petition. <u>Raspberry v. Garcia</u> , 448 F.3d 1150, 1154 (9th Cir.	
12	2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot consider a petition	
13	that is unexhausted. <u>Rose v. Lundy</u> , 455 U.S. 509, 521-22 (1982).	
14	ORDER	
15	Accordingly, within twenty-one days the Court ORDERS Petitioner to show cause why	
16	the petition should not be dismissed for failure to exhaust state remedies.	
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18	IT IS SO ORDERED.	
19	Dated: October 4, 2017 /s/ Jennifer L. Thurston UNITED STATES MAGISTRATE JUDGE	
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