

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERTO CISNEROS MORENO,

Petitioner,

v.

SCOTT FRAUENHEIM, Warden,

Respondent.

No. 1:17-cv-01306-JLT (HC)

**ORDER DISMISSING PETITION
WITHOUT PREJUDICE FOR FAILURE
TO EXHAUST STATE REMEDIES**

**ORDER DIRECTING CLERK OF COURT
TO ENTER JUDGMENT**

**ORDER DECLINING ISSUANCE OF
CERTIFICATE OF APPEALABILITY**

Petitioner filed a habeas petition on October 2, 2017, challenging his 2012 conviction in Tulare County Superior Court of multiple sex offenses. The petition appeared to be unexhausted, so the Court issued an order directing Petitioner to show cause why it should not be dismissed without prejudice. Petitioner has not responded to the Court's order within the allotted time. Accordingly, the Court will dismiss the petition without prejudice for failure to exhaust.

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 petition and any attached exhibits 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

1 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to
2 dismiss, or after an answer to the petition has been filed. *Herbst v. Cook*, 260 F.3d 1039 (9th
3 Cir.2001).

4 B. Exhaustion

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

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

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

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

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

26 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his
27 federal claims in state court unless he specifically indicated to that court that those
28 claims were based on federal law. See *Shumway v. Payne*, 223 F.3d 982, 987-88
(9th Cir. 2000). Since the Supreme Court's decision in *Duncan*, this court has held
that the petitioner must make the federal basis of the claim explicit either by citing

1 *federal law or the decisions of federal courts, even if the federal basis is “self-*
2 *evident,”* Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
3 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under
4 state law on the same considerations that would control resolution of the claim on
federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999);
Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

5 In Johnson, we explained that the petitioner must alert the state court to the fact
6 that the relevant claim is a federal one without regard to how similar the state and
federal standards for reviewing the claim may be or how obvious the violation of
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 brings one claim of ineffective assistance of counsel. He states he filed an
10 appeal in the California Court of Appeal, but that appeal challenged a restitution fine and an
11 incorrect abstract of judgment. It appears he has not filed any other state court actions. Because
12 it appears Petitioner has not presented his claims for federal relief to the California Supreme
13 Court, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
14 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot consider a petition
15 that is unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

16 **CERTIFICATE OF APPEALABILITY**

17 In addition, the Court declines to issue a certificate of appealability. A state prisoner
18 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of
19 his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537
20 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate of
21 appealability is 28 U.S.C. § 2253, which provides as follows:

22 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
23 judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit
in which the proceeding is held.

24 (b) There shall be no right of appeal from a final order in a proceeding to test the
25 validity of a warrant to remove to another district or place for commitment or trial a person
26 charged with a criminal offense against the United States, or to test the validity of such person’s
detention pending removal proceedings.

27 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may
not be taken to the court of appeals from—

28 (A) the final order in a habeas corpus proceeding in which the detention

1 complained of arises out of process issued by a State court; or

2 (B) the final order in a proceeding under section 2255.

3 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has
4 made a substantial showing of the denial of a constitutional right.

5 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue
6 or issues satisfy the showing required by paragraph (2).

7 If a court denies a petitioner's petition, the court may only issue a certificate of
8 appealability when a petitioner makes a substantial showing of the denial of a constitutional right.
9 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that
10 "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have
11 been resolved in a different manner or that the issues presented were 'adequate to deserve
12 encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting
13 Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

14 In the present case, the Court finds that Petitioner has not made the required substantial
15 showing of the denial of a constitutional right to justify the issuance of a certificate of
16 appealability. Reasonable jurists would not find the Court's determination that Petitioner is not
17 entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to
18 proceed further. Thus, the Court **DECLINES** to issue a certificate of appealability.

19 **ORDER**

20 Accordingly, the Court **ORDERS**:

- 21 1. The petition is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state
22 remedies;
- 23 2. The Clerk of Court is **DIRECTED** to enter judgment and close the case; and
- 24 3. The Court **DECLINES** to issue a certificate of appealability. This terminates this
25 action in its entirety.

26 IT IS SO ORDERED.

27 Dated: **November 7, 2017**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE