

1 **I. Procedural Background**

2 On December 22, 2017, Petitioner filed his petition for writ of habeas corpus with this
3 Court. (Doc. 1.) On January 9, 2018, United States Magistrate Judge Jennifer L. Thurston
4 ordered Respondent to file a response to the petition. (Doc. 6.) Respondent filed a motion to
5 dismiss on June 19, 2018, contending the petition should be dismissed because Petitioner failed to
6 exhaust state judicial remedies. (Doc. 20.) On June 28, 2018, Petitioner filed a “Motion for
7 Dismissal Without Prejudice,” moving to voluntarily dismiss his petition without prejudice so he
8 may “cure procedural judicial defects in the state courts.” (Doc. 21.) Respondent did not file a
9 response to Petitioner’s motion to dismiss.
10

11 **II. Petitioner Did Not Exhaust His State Judicial Remedies on his Procedural Due**
12 **Process Claim**

13 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
14 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
15 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
16 opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501
17 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*, 854 F.2d 1158,
18 1163 (9th Cir. 1988).
19

20 A petitioner can satisfy the exhaustion requirement by providing the highest state court
21 with a full and fair opportunity to consider each claim before presenting it to the federal court.
22 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971);
23 *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest
24 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the
25 highest state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365; *Kenney v.*
26 *Tamayo-Reyes*, 504 U.S. 1, 8 (1992).
27
28

1 The petitioner must also have specifically informed the state court that he was raising a
2 federal constitutional claim. *Duncan*, 513 U.S. at 365-66; *Lyons v. Crawford*, 232 F.3d 666, 669
3 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
4 1999); *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998). If any of grounds for collateral
5 relief set forth in a petition for habeas corpus are unexhausted, the Court must dismiss the
6 petition. 28 U.S.C. § 2254(b)(1); *Rose*, 455 U.S. at 521-22. Here, Petitioner did not present his
7 claim to the state court.

9 Although non-exhaustion of state court remedies has been viewed as an affirmative
10 defense, it is established that it is the petitioner's burden to prove that state judicial remedies were
11 properly exhausted. 28 U.S.C. § 2254(b)(1)(A); *Darr v. Burford*, 339 U.S. 200, 218-19 (1950),
12 *overruled in part on other grounds in Fay v. Noia*, 372 U.S. 391 (1963); *Cartwright v. Cupp*, 650
13 F.2d 1103, 1104 (9th Cir. 1981). If available state court remedies have not been exhausted as to
14 all claims, a district court must dismiss a petition. *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982).
15 *See also Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice* 276 F.3d 478,
16 481 (9th Cir. 2001) (both holding that when none of a petitioner's claims has been presented to the
17 highest state court as required by the exhaustion doctrine, the Court must dismiss the petition).

19 Because Petitioner did not exhaust his procedural due process claim before the state court,
20 the Court recommends granting his motion to dismiss his petition without prejudice.

22 **III. Certificate of Appealability**

23 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
24 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
25 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
26 certificate of appealability is 28 U.S.C. § 2253, which provides:
27
28

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

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

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

11 (A) the final order in a habeas corpus proceeding in which the
12 detention complained of arises out of process issued by a State court; or

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

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

17 (3) The certificate of appealability under paragraph (1) shall
18 indicate which specific issues or issues satisfy the showing required by
19 paragraph (2).

20 If a court denies a habeas petition, the court may only issue a certificate of appealability
21 "if jurists of reason could disagree with the district court's resolution of his constitutional claims
22 or that jurists could conclude the issues presented are adequate to deserve encouragement to
23 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
24 Although the petitioner is not required to prove the merits of his case, he must demonstrate
25 "something more than the absence of frivolity or the existence of mere good faith on his . . .
26 part." *Miller-El*, 537 U.S. at 338.

27 Reasonable jurists would not find the Court's determination that Petitioner is not entitled
28 to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed
further. Accordingly, the Court recommends declining to issue a certificate of appealability.

