

1 dismiss, or after an answer to the petition has been filed. *Herbst v. Cook*, 260 F.3d 1039 (9th
2 Cir.2001).

3 **B. Exhaustion**

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

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

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

18 In *Picard v. Connor*, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
19 remedies requires that petitioners “fairly presen[t]” federal claims to the state
20 courts in order to give the State the “opportunity to pass upon and correct alleged
21 violations of the prisoners' federal rights” (some internal quotation marks omitted).
22 If state courts are to be given the opportunity to correct alleged violations of
23 prisoners' federal rights, they must surely be alerted to the fact that the prisoners
24 are asserting claims under the United States Constitution. If a habeas petitioner
25 wishes to claim that an evidentiary ruling at a state court trial denied him the due
26 process of law guaranteed by the Fourteenth Amendment, he must say so, not only
27 in federal court, but in state court.

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

Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his
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*
*(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
federal law or the decisions of federal courts, even if the federal basis is “self-
*evident,” *Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999) (citing *Anderson v.**

1 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under
2 state law on the same considerations that would control resolution of the claim on
3 federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999);
4 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
7 federal standards for reviewing the claim may be or how obvious the violation of
8 federal law is.

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

11 Petitioner indicates he has not sought relief in any state court. Because Petitioner has not
12 presented his claims for federal relief in the state courts, including the California Supreme Court,
13 the Court finds that dismissal of the petition without prejudice is appropriate. Raspberry v.
14 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).
15 The Court cannot proceed with a petition that is entirely unexhausted. 28 U.S.C. § 2254(b)(1).

16 **ORDER**

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

19 **RECOMMENDATION**

20 Accordingly, the Court RECOMMENDS that the habeas corpus petition be DISMISSED
21 WITHOUT PREJUDICE for lack of exhaustion.

22 This Findings and Recommendation is submitted to the United States District Court Judge
23 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304
24 of the Local Rules of Practice for the United States District Court, Eastern District of California.
25 Within twenty-one days after being served with a copy, Petitioner may file written objections
26 with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings
27 and Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28

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1 U.S.C. § 636 (b)(1)(C). Failure to file objections within the specified time may waive the right
2 to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: April 19, 2018

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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