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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DEXTER LAWRENCE GRIFFIN,)	Case No.: 1:21-cv-01516-JLT (HC)
Petitioner,)	ORDER DIRECTING CLERK OF COURT TO
v.)	ASSIGN DISTRICT JUDGE
BRANDON PRICE, Warden,)	FINDINGS AND RECOMMENDATIONS TO
Respondent.)	DISMISS UNEXHAUSTED PETITION WITHOUT
)	PREJUDICE
)	[TWENTY-ONE DAY OBJECTION DEADLINE]

On September 29, 2021, Petitioner filed the instant petition for writ of habeas corpus in United States District Court for the Northern District of California. (Doc. 1.) The Northern District transferred the petition to this Court on October 8, 2021. (Doc. 4.) On October 25, 2021, the Court issued an order to show cause why the petition should not be dismissed for failure to exhaust state remedies. (Doc. 10.) On November 18, 2021, Petitioner filed a response to the order to show cause, however, failed to indicate that he has presented his claim for federal relief to the highest state court. (See Doc. 10.) Accordingly, the Court will recommend that the petition be dismissed without prejudice.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in

1 the district court. . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory
2 Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus,
3 either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after an
4 answer to the petition has been filed.

5 B. Exhaustion

6 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
7 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
8 exhaustion doctrine is based on comity to the state court and gives the state court the initial
9 opportunity to correct the state’s alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
10 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

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

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

20 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
21 remedies requires that petitioners “fairly present” federal claims to the state courts in
22 order to give the State the “opportunity to pass upon and correct alleged violations of the
23 prisoners’ federal rights” (some internal quotation marks omitted). If state courts are to
24 be given the opportunity to correct alleged violations of 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 federal
27 claims in state court *unless he specifically indicated to that court that those claims were*
28 *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

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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. Harless, 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 federal grounds, *see, e.g.,* Hiiivala v. Wood, 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

In Johnson, 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 federal standards for reviewing the claim may be or how obvious the violation of federal law is.

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

Petitioner fails to indicate in his petition that he has presented his claim for federal relief to the highest state court. (See Docs. 1, 12.) Also, in his response to the order to show cause, Petitioner fails to provide additional information that demonstrates that he has sought relief in the California Supreme Court. (See Doc. 12.) Accordingly, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot consider a petition that is unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

ORDER

The Court DIRECTS the Clerk of Court to assign a district judge to the case.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that the habeas corpus petition be SUMMARILY DISMISSED without prejudice for lack of jurisdiction.

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

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

3
4 IT IS SO ORDERED.

5 Dated: December 7, 2021

/s/ Jennifer L. Thurston
6 CHIEF UNITED STATES MAGISTRATE JUDGE