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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOEL RUBEN GARCIA,  
Petitioner,  
v.  
BRYAN PHILLIPS,  
Respondent.

No. 1:24-cv-00091-KES-SKO (HC)  
**FINDINGS AND RECOMMENDATION  
TO GRANT RESPONDENT’S MOTION  
TO DISMISS MIXED PETITION**  
**[Doc. 11]**  
**[TWENTY-ONE DAY OBJECTION  
DEADLINE]**

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed the instant petition on January 19, 2024, challenging his 2020 conviction in Fresno County Superior Court of one count of forcible lewd act upon a child, two counts of committing a lewd act upon a child, one count of attempted lewd act upon a child, and one count of assault by means likely to produce great bodily injury. (Doc. 12-1 at 1.) He was sentenced a total term of 26 years in state prison. (Doc. 12-1 at 1.)

Petitioner appealed to the California Court of Appeals. On August 17, 2023, the appellate court affirmed the judgment. (Doc. 12-2.) Petitioner filed a petition for review with the California Supreme Court, which was denied on October 25, 2023. (Doc. 12-3,4.)

1 On March 21, 2024, Respondent filed a motion to dismiss for failure to exhaust state  
2 remedies. (Doc. 11.) Petitioner did not file an opposition. Upon review of the pleadings, the  
3 Court finds the petition to be a mixed petition containing exhausted and unexhausted claims.  
4 Thus, the Court will recommend Respondent’s motion to dismiss be GRANTED and Petitioner  
5 be DIRECTED to amend the petition to delete the unexhausted claims or request dismissal of the  
6 petition without prejudice so that Petitioner may return to state court to exhaust his state  
7 remedies.

## 8 DISCUSSION

### 9 A. Preliminary Review of Petition

10 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
11 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not  
12 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.  
13 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
14 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to  
15 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th  
16 Cir.2001).

### 17 B. Exhaustion

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

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

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

4           In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state  
5 remedies requires that petitioners “fairly presen[t]” federal claims to the state  
6 courts in order to give the State the “opportunity to pass upon and correct alleged  
7 violations of the prisoners' federal rights” (some internal quotation marks omitted).  
8 If state courts are to be given the opportunity to correct alleged violations of  
9 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.

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

11           Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his  
12 federal claims in state court *unless he specifically indicated to that court that those*  
13 *claims were based on federal law. See Shumway v. Payne*, 223 F.3d 982, 987-88  
14 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held  
15 that the *petitioner must make the federal basis of the claim explicit either by citing*  
16 *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.  
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. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999);  
Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); . . . .

17           In Johnson, we explained that the petitioner must alert the state court to the fact  
18 that the relevant claim is a federal one without regard to how similar the state and  
19 federal standards for reviewing the claim may be or how obvious the violation of  
federal law is.

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

22           Petitioner raised the following three claims in his petition: 1) “The court abused its  
23 discretion under Evidence Code Section 352 and 1108 by admitting evidence of five uncharged  
24 allegations”; 2) “Ineffective assistance of counsel regarding admission of the uncharged  
25 offenses”; and 3) “The court abused its discretion in denying Romero motion.” (Doc. 1 at 5-8.)

26           Respondent contends that Petitioner failed to exhaust grounds one and three in the state  
27 courts. Respondent is correct. The petition for review in the California Supreme Court only  
28 contained one claim: the ineffective assistance of counsel claim. The instant petition is therefore

1 a mixed petition containing exhausted and unexhausted claims. Petitioner must be given the  
2 option of exhausting the unexhausted claims by returning to state court, or abandoning the claims  
3 and pursuing the remaining claim in this Court. Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir.  
4 2005); see also Butler v. Long, 752 F.3d 1177, 1191 (9th Cir. 2014).

5 **RECOMMENDATION**

6 Based on the foregoing, the Court RECOMMENDS that Respondent's motion to dismiss  
7 be granted, and Petitioner be directed to either amend the petition to delete the unexhausted claim  
8 or request dismissal of the petition without prejudice so he may return to state court to exhaust the  
9 unexhausted claim.

10 This Findings and Recommendation is submitted to the United States District Court Judge  
11 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304  
12 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
13 Within twenty-one (21) days after being served with a copy, any party may file written objections  
14 with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
15 and Recommendation." Replies to the Objections shall be served and filed within ten court days  
16 (plus three days if served by mail) after service of the Objections. The Court will then review the  
17 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that  
18 failure to file objections within the specified time may waive the right to appeal the Order of the  
19 District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). This recommendation is not an  
20 order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal  
21 pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of  
22 the District Court's judgment.

23  
24 IT IS SO ORDERED.

25 Dated: May 8, 2024

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE