

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 15 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

CHRISTOPHER ALLRED,

Petitioner-Appellant,

v.

JEFFREY A. UTTECHT, Warden,

Respondent-Appellee.

No. 19-36040

D.C. No. 3:19-cv-05687-RJB  
Western District of Washington,  
Tacoma

ORDER

Before: CANBY and CALLAHAN, Circuit Judges.

This appeal is from the dismissal of appellant's 28 U.S.C. § 2254 petition and denial of a subsequent motion for reconsideration. The requests for a certificate of appealability (Docket Entry Nos. 4, 6, 8) are denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

**DENIED.**

"APPENDIX A"  
[30.]

**UNITED STATES DISTRICT COURT**  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

Petitioner,

v.

JEFFREY A UTTECHT,

Respondent.

**JUDGMENT IN A CIVIL CASE**

CASE NO. C19-5687-RJB-TLF

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. Petitioner's 28 U.S.C. § 2254 habeas petition is DENIED and this case is DISMISSED without prejudice for failure to exhaust state court remedies. Petitioner is DENIED issuance of a certificate of appealability.

Dated this 5th day of November, 2019.

William M. McCool  
Clerk of Court

s/ Emerald R. Ackley  
Deputy Clerk

"APPENDIX B"  
(31.)

STATE OF WASHINGTON }

} ss.

County of Clark )

### OATH OF OFFICE

I, SCOTT A. COLLIER, do solemnly swear (or affirm) that I am a Citizen of the United States and of the State of Washington; that I will support the Constitution and Laws of the United States and the Constitution and Laws of the State of Washington, and will to the best of my judgment, skill and ability, truly, faithfully, diligently and impartially perform the duties of the office of **SUPERIOR COURT JUDGE, DEPARTMENT NO. 10, in and for Clark County, Washington**, as such duties are prescribed by law.

Scott A. Collier

Subscribed and sworn to before me this 12 day of December 2016.

Roger G. Bennett

Municipal Court Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

Petitioner,

V.

JEFFREY A UTTECHT,

**Respondent.**

Case No. C19-5687-RJB-TLF

## REPORT AND RECOMMENDATION

Noted for October 25, 2019

Petitioner, who is proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on July 22, 2019. Dkts. 1, 7. The petition has not been served on the respondent. As discussed in more detail below, by order dated August 27, 2019, petitioner was given an opportunity to either (1) show cause why his petition should not be dismissed for failure to exhaust state court remedies, or (2) file an amended petition. Dkt. 8. In response, to the Court’s order, petitioner filed a document entitled “Motion to Compel Information (Show Cause)” which argues petitioner is not required to exhaust his state judicial remedies and asks the Court “to order Respondent to present the Bill of Indictment by a Grand Jury causing the order to Petitioner’s arrest and detainment in accordance with the 5<sup>th</sup> Amendment[.]” Dkt. 9.

The Court should dismiss the federal habeas petition without prejudice for failure to exhaust state judicial remedies. The Court should further deny petitioner’s “Motion to Compel Information” as moot if the Court adopts the recommendation that the petition be dismissed.

1 Also, for the reasons set forth below, the Court should deny issuance of a certificate of  
2 appealability (COA).

3 BACKGROUND

4 Petitioner challenges his August 2016 conviction and sentence for Second Degree Rape,  
5 two counts of First Degree Incest, and Second Degree Incest. Dkt. 7. Petitioner seeks release  
6 from incarceration on the grounds that he is “illegally and unlawfully imprisoned as a result of  
7 the abrogation of my federally conferred Constitutional rights by the State of Washington and its  
8 willful defiance of the established procedures and processes set forth by the U.S. Constitution.”

9 *Id.*, at 5. Petitioner contends his federal constitutional rights were violated because he was not  
10 charged in the state court by Grand Jury Indictment as required by the Fifth Amendment. *Id.*

11 Petitioner does not state that he has exhausted his state court remedies. *Id.* Petitioner  
12 indicates he filed a direct appeal on different grounds<sup>1</sup> than those raised in the instant petition  
13 and that his petition for review of those grounds was denied by the Washington State Supreme  
14 Court on October 31, 2018. Dkt. 8; Dkt. 7, at 2. Petitioner also indicates in his petition that he  
15 intends not to bring the claims raised in his federal habeas petition to the state courts—state  
16 courts would never have the opportunity to consider the habeas claims raised in his federal  
17 petition—and he contends the state courts lack jurisdiction over issues that are raised under the  
18 United States Constitution. Dkt. 7, at 5-12.

19 Petitioner states that he did not raise these issues raised in his petition on direct appeal to  
20 the highest state court having jurisdiction because “[t]he State of Washington does not have  
21 jurisdictional authority to decide on United States Constitution matters, which are outside it’s  
22

23 <sup>1</sup> Specifically, petitioner indicates he raised the following grounds on direct appeal: the state presented expert  
24 testimony on delayed disclosure, ineffective assistance of counsel, government and prosecutorial misconduct, and  
false accusations. Dkt. 7, at 2.

1 [sic] jurisdictional or statutory governing limits." *Id.*, at 7-13. He also states he has not raised the  
2 grounds raised in the instant petition in a post-conviction motion or petition for habeas corpus in  
3 a state trial court. *Id.*, at 7-13. He further states that "[n]o grounds herein have been raised at the  
4 state level, as the state has no jurisdictional authority over federal matters."<sup>2</sup> *Id.*, at 12.

5 By order dated August 27, 2019, the Court noted that petitioner's federal habeas petition—  
6 on its face—was subject to dismissal due to a failure to exhaust state court remedies as petitioner  
7 specifically indicated he had not raised the grounds raised in his petition to the state courts. Dkt.  
8 8. The Court also noted that the petition indicated petitioner may have exhausted other claims but  
9 that those claims were not raised as grounds in his federal habeas petition. *Id.* Petitioner was  
10 advised that a state prisoner is required to exhaust all state court remedies, by fairly presenting  
11 claims of violation of federal rights before the state courts, before seeking a writ of habeas corpus.  
12 *Id.*; 28 U.S.C. § 2254(b)(1). Petitioner was advised that to properly exhaust his federal claims, he  
13 must finish "one complete round of the State's established appellate review process," up to the  
14 highest state court with powers of discretionary review. *Id.*; *O'Sullivan v. Boerckel*, 526 U.S. 838,  
15 845 (1999).

16 Accordingly, the Court directed petitioner to either (1) show cause why his petition  
17 should not be dismissed without prejudice for failure to exhaust state court remedies or (2) to file  
18 an amended petition including his exhausted grounds and either (a) delete his unexhausted  
19 grounds from the amended petition if he did not intend to pursue them, or (b) request the Court  
20 stay proceedings on his mixed habeas petition to allow him to present his unexhausted claims to  
21

22 <sup>2</sup> The Court notes that in the box labeled item 13(a) of the petition the petitioner checked "yes" in response to the  
23 question of whether all grounds for relief raised in the petition have been presented to the highest state court having  
24 jurisdiction. Dkt. 7, at 12. The Court interprets this as a typographical or scrivener's error -- petitioner makes clear  
25 in his explanation to the question that "**no grounds herein have been raised at the state level**, as the state has no  
jurisdictional authority over federal constitutional matters." *Id.* (emphasis added).

1 the state courts. *Id.*; See *Rhines v. Weber*, 544 U.S. 269, 274-79 (2005) (When faced with a  
2 mixed petition containing both exhausted and unexhausted claims a federal district court may  
3 generally exercise one of three options: (1) dismiss the mixed petition without prejudice to allow  
4 the petitioner to present his unexhausted claims to the state court and then return to federal court  
5 to file a new habeas petition containing all of the claims; (2) stay the mixed petition to allow the  
6 petitioner to present his unexhausted claims to the state court and then return to federal court for  
7 review of his perfected petition; or (3) allow the petitioner to delete the unexhausted claims and  
8 to proceed with the exhausted claims.).

9        In response to the Court’s order, petitioner filed a document entitled “Motion to Compel  
10      Information (Show Cause)” which argues petitioner is not required to exhaust his state judicial  
11      remedies and asks the Court “to order Respondent to present the Bill of Indictment by a Grand  
12      Jury causing the order to Petitioner’s arrest and detainment in accordance with the 5<sup>th</sup>  
13      Amendment[.]” Dkt. 9. Petitioner’s response fails to remedy the deficiencies in the petition noted  
14      by the Court’s order to show cause. *Id.* He largely re-iterate his jurisdictional arguments and ask  
15      the court to consider the merits of his constitutional claims (that his federal constitutional rights  
16      were violated because he was not charged in the state court by Grand Jury Indictment) without  
17      requiring exhaustion. *Id.*

## **DISCUSSION**

#### A. Habeas Petition – Failure to Exhaust State Court Remedies

Under Rule 4 of the rules governing § 2254 petitions, the Court must promptly examine a habeas petition when it is filed, and if it plainly appears from the petition and its attachments the petitioner is not entitled to relief, the Court must dismiss the petition.

1       The Court concludes that petitioner's federal habeas petition should be dismissed without  
2 prejudice for failure to exhaust state court remedies. Petitioner plainly acknowledges he has not  
3 presented the claims raised in his petition to the highest state court and, as such, his petition is  
4 not eligible for federal habeas review. Dkt. 7, at 1-12. Exhaustion of state court remedies is a  
5 prerequisite to granting a petition for writ of habeas corpus. *See* 28 U.S.C. § 2254(b)(1) ("An  
6 application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment  
7 of a State court shall not be granted unless it appears that--(A) the applicant has exhausted the  
8 remedies available in the courts of the State[.]").

9       Petitioner indicates that he does not intend to bring his claims to the state courts—state  
10 courts would never have the opportunity to consider the habeas claims raised in his federal  
11 petition—asserting that the state courts lack jurisdiction over issues that are raised under the  
12 United States Constitution. Dkt. 7, at 5-12.

13       A state prisoner is required to exhaust all state court remedies, by fairly presenting claims  
14 of violation of federal rights before the state courts, before seeking a writ of habeas corpus. 28  
15 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state  
16 courts the "initial opportunity to pass upon and correct alleged violations of its prisoners' *federal*  
17 rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (emphasis added). This is appropriate, because  
18 "state courts, like federal courts, are obliged to enforce federal law." *O'Sullivan v. Boerckel*, 526  
19 U.S. 838, 844 (1999). To properly exhaust their federal claims, a would-be habeas petitioner must  
20 finish "one complete round of the State's established appellate review process," up to the highest  
21 state court with powers of discretionary review. *Id.*, at 845.

22       A federal court must dismiss a federal habeas corpus petition if its claims are unexhausted.  
23 *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). This Court has the *sua sponte* authority to  
24  
25

1 examine the question of exhaustion at this stage of review. *Campbell v. Crist*, 647 F.2d 956, 957  
2 (9th Cir. 1981) (“This court may consider whether state remedies have been exhausted even if the  
3 state does not raise the issue”).

4 Petitioner must raise the grounds for relief contained in his habeas petition to the  
5 Washington Court of Appeals and Washington Supreme Court. Petitioner contends he has not  
6 presented the grounds for relief raised in his federal habeas petition to the state courts because  
7 the state courts lack the “jurisdictional authority to decide on United States Constitution matters,  
8 which are outside [its] jurisdictional or statutory governing limits.” Dkt. 7, at 5-12. This  
9 argument fails because 28 U.S.C. § 2254(d)(1) recognizes the jurisdiction of state courts to  
10 adjudicate whether the federal constitutional rights of a state criminal defendant were violated.  
11 Federal habeas relief is available to address where the state court’s adjudication was “contrary to,  
12 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
13 Court of the United States.” 28 U.S.C. § 2254(d)(1).

14 As the petition plainly states, petitioner has not properly exhausted all the claims for  
15 relief raised in his federal habeas petition in the state courts. To the extent petitioner intends to  
16 argue that presentation of his claims to the state court would be futile because the state has  
17 enacted a constitution which conflicts with the federal constitution, this argument fails as state  
18 courts are “equally bound to guard and protect rights secured by the [federal] Constitution,” *Ex*  
19 *parte Royall*, 117 U.S. 241, 251 (1886); *Duckworth v. Serrano*, 454 U.S. 1, 3-4 (1981). An  
20 exception to exhaustion is made only if there is no opportunity to obtain redress in state court or  
21 if the corrective process is so clearly deficient as to render futile any effort to obtain relief.  
22 *Duckworth*, 454 U.S. at 3-4; 28 U.S.C. §2254(b)(1)(B).

23

24

25

1 Petitioner makes no showing that such an exception to the exhaustion requirement applies  
2 here. *See Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988) (even if a petitioner believes it  
3 would be futile to argue his Constitutional claims to the state courts because he does not believe  
4 they would be successful, “the apparent futility of presenting claims to state courts does not  
5 constitute cause of procedural default.”). Moreover, the fact that petitioner himself believes this  
6 to be a clear or obvious violation of the federal constitution does not excuse him from the  
7 exhaustion requirement. *See Duckworth*, 454 U.S. at 4 (“obvious constitutional errors, no less  
8 than obscure transgressions, are subject to the [exhaustion] requirements of §2254(b)[.]”).

9 Petitioner plainly acknowledges he has not presented the claims raised in his petition to  
10 the highest state court and presents no colorable claim that an exception to the exhaustion  
11 requirement applies in his case. Moreover, according to petitioner, his petition for review on his  
12 direct appeal was denied by the Washington State Supreme Court on October 31, 2018, and,  
13 according to state court records, the mandate issued on November 21, 2018.<sup>3</sup> As such, it appears  
14 the one-year statute of limitations for seeking post-conviction collateral relief in state court has  
15 not yet run and that state remedies remain available. RCW 10.73.090; 28 U.S.C. § 2244(d).

16  
17  
18  
19  
20  
21  
22 <sup>3</sup> The Court takes judicial notice of Clark County Superior Court case *State v. Allred*, Case No. 493756, located at  
23 <http://dw.courts.wa.gov> (last accessed October 4, 2019), and the Washington Court of Appeals decision *State v.*  
24 *Allred*, 4 Wash.App.2d 1040, Not Reported in Pac. Rptr. (2018) (unpublished); *see also Burbank–Glendale–*  
25 *Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998) (court may take judicial notice of  
court filings and other matters of public record, as such documents “are not subject to reasonable dispute”).

1 Accordingly, petitioner is not eligible for federal habeas review.<sup>4</sup> <sup>5</sup> Dkt. 7, at 1-12; *see Ha Van*  
2 *Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013) (citing *King v. Ryan*, 564 F.3d 1133, 1142  
3 (9th Cir. 2009)) (“To be properly filed, a claim must have been exhausted *at the time of filing*.”)  
4 (emphasis added).

5 **B. “Motion to Compel Information”**

6 In response to the Court’s order to show cause petitioner filed a document entitled  
7 “Motion to Compel Information” which requests that the Court “order Respondent to present the  
8 Bill of Indictment of a Grand Jury causing the order of Petitioner’s arrest and detainment, in  
9 accordance with the 5<sup>th</sup> Amendment of the United States Constitution” and to “proceed in a  
10 summary way” to decide the petition. Dkt. 9. Petitioner also argues that because a habeas petition  
11 is “an original action,” and “not an appeal or a mechanism requesting the review of [his]

12  
13 <sup>4</sup> The Court notes that several similar petitions by different petitioners presenting the same grounds for relief and  
offering the same explanation for failure to exhaust state judicial remedies have been considered and dismissed by  
14 this court prior to service, pursuant to Rule 4, based on petitioner’s failure to exhaust state judicial remedies. *See,*  
*e.g.*, *Duchow v. State of Washington*, Case No. 19-cv-687-RSL-MAT (W.D. Wash., June 14, 2019) (dismissal  
15 without prejudice for failure to exhaust state court remedies); *Wamba v. State of Washington*, Case No. 19-cv-661-  
TSZ-MAT (W.D. Wash., June 13, 2019) (dismissal without prejudice for failure to exhaust state court remedies);  
*Domingo v. State of Washington*, Case No. 19-cv-659-MJP-BAT (W.D. Wash., June 18, 2019) (dismissal for failure  
16 to exhaust state court remedies and because grounds raised in petition are without merit); *Nguyen v. State of*  
*Washington*, Case No. 19-cv-5388-JCC-BAT (W.D. Wash., July 9, 2019) (dismissal for failure to exhaust state court  
17 remedies and because grounds raised in petition are without merit); *Urbina v. State of Washington*, Case No. 19-cv-  
648-BJR-BAT (W.D. Wash., May 21, 2019) (dismissal for failure to exhaust state court remedies and because  
18 grounds raised in petition are without merit).

19 <sup>5</sup> The Court also notes that it appears that petitioner’s substantive constitutional claims also lack merit as it has long  
been settled that there is no denial of Federal Constitutional rights involved in the substitution of the prosecuting  
attorney’s criminal information for the grand jury’s indictment. *Hurtado v. People of State of California*, 110 U.S.  
516 (1884) (Rejecting claim that grand jury indictment is essential to due process and that it is a violation of the  
20 Fourteenth Amendment for a state to prosecute a defendant by criminal information). This rule has been specifically  
applied to Washington’s state practice of prosecution by information. *Gaines v. Washington*, 277 U.S. 81, 48 S.Ct.  
468, 72 L.Ed. 793 (1928); *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993); and *see Domingo*, Case No. 19-cv-  
659-MJP-BAT (W.D. Wash., June 18, 2019) (dismissal for failure to exhaust state court remedies and because  
21 grounds raised in petition are without merit); *Nguyen*, Case No. 19-cv-5388-JCC-BAT (W.D. Wash., July 9, 2019)  
(dismissal for failure to exhaust state court remedies and because grounds raised in petition are without merit);  
*Urbina*, Case No. 19-cv-648-BJR-BAT (W.D. Wash., May 21, 2019) (dismissal for failure to exhaust state court  
22 remedies and because grounds raised in petition are without merit). However, the Court need not reach the merits of  
petitioner’s claims as it is clear from the face of the petition that he has failed to exhaust his state court remedies.  
23  
24

1 judgment of conviction,” that his right to habeas relief may not be conditioned upon the  
2 “exhaustion of any other remedy.” *Id.*

3 As noted above, these arguments fail as the governing statute both (1) recognizes the  
4 authority of state courts to adjudicate whether the federal constitutional rights of a state criminal  
5 defendant were violated; and, (2) makes clear that a state prisoner is required to exhaust all state  
6 court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. §§ 2254(b)(1), (d)(1).

7 Accordingly, the Court should deny petitioner’s “Motion to Compel Information” (Dkt.  
8 9) as moot, if the Court adopts the recommendation that the petition be dismissed.

9 CONCLUSION AND DEADLINE FOR OBJECTIONS

10 For the foregoing reasons, this Court recommends that petitioner’s federal habeas petition  
11 (Dkt. 7), and this action, be **dismissed without prejudice for failure to exhaust state court**  
12 **remedies.** The Court further recommends petitioner’s “Motion to Compel Information”, (Dkt. 9)  
13 **be denied as moot** if the Court adopts the recommendation of dismissal of the petition. The  
14 Court may also repeat the offer for petitioner to exercise an option to: File an amended petition  
15 including his exhausted grounds and either (a) delete his unexhausted grounds from the amended  
16 petition if he does not intend to pursue them, or (b) request the Court stay proceedings on his  
17 mixed habeas petition to allow him to present his unexhausted claims to the state courts.

18 *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *See Rhines v. Weber*, 544 U.S. 269, 274-79  
19 (2005) (When faced with a mixed petition containing both exhausted and unexhausted claims a  
20 federal district court may generally exercise one of three options: (1) dismiss the mixed petition  
21 without prejudice to allow the petitioner to present his unexhausted claims to the state court and  
22 then return to federal court to file a new habeas petition containing all of the claims; (2) stay the  
23 mixed petition to allow the petitioner to present his unexhausted claims to the state court and

24

25

1 then return to federal court for review of his perfected petition; or (3) allow the petitioner to  
2 delete the unexhausted claims and to proceed with the exhausted claims.

3 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's  
4 dismissal of his federal habeas petition only after obtaining a certificate of appealability from a  
5 district or circuit judge. A certificate of appealability may issue only where a petitioner has made  
6 "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). A  
7 petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the  
8 district court's resolution of his constitutional claims or that jurists could conclude the issues  
9 presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537  
10 U.S. 322, 327 (2003). Under the above standard, this Court concludes that petitioner is not entitled  
11 to a certificate of appealability in this matter. This Court therefore **recommends that a certificate**  
12 **of appealability be denied.** A proposed order accompanies this Report and Recommendation.

13 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
14 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
15 Recommendation is signed. Failure to file objections within the specified time may affect your  
16 right to appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Objections should be noted for consideration  
17 on the District Judge's motions calendar for the third Friday after they are filed. Responses to  
18 objections may be filed within **fourteen (14) days** after service of objections. If no timely  
19 objections are filed, the matter will be ready for consideration by the District Judge on **October**  
20 **25, 2019.**

21 Dated this 8th day of October, 2019.

22   
23 Theresa L. Fricke  
24 United States Magistrate Judge  
25

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

Petitioner,

V.

JEFFREY A UTTECHT,

### Respondent.

Case No. C19-5687-RJB-TLF

## ORDER ADOPTING REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Magistrate Judge Fricke's Report and

Recommendation [Dkt. #   ], recommending that the Court deny petitioner's federal *habeas corpus* petition without prejudice:

- (1) The Magistrate Judge's report and recommendation is approved and ADOPTED;
- (2) Petitioner's federal habeas corpus petition (Dkt. 7) is DISMISSED without prejudice for failure to exhaust state court remedies; and
- (3) Petitioner's "Motion to Compel Information", (Dkt. 9) is DENIED as moot; and
- (4) A certificate of appealability is DENIED; and
- (5) The Clerk is directed to close this case and to send copies of this Order to petitioner, to Magistrate Judge Theresa L. Fricke and to any other party that has appeared in this action.

IT IS SO ORDERED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2019.

1  
2 Robert Bryan  
3 United States District Judge  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORDER ADOPTING REPORT AND RECOMMENDATION

**UNITED STATES DISTRICT COURT**  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

Petitioner,

v.

JEFFREY A UTTECHT,

Respondent.

**JUDGMENT IN A CIVIL CASE**

CASE NO. C19-5687-RJB-TLF

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. Petitioner's 28 U.S.C. § 2254 habeas petition is DENIED and this case is DISMISSED without prejudice for failure to exhaust state court remedies. Petitioner is DENIED issuance of a certificate of appealability.

Dated this \_\_ day of [Pick the date].

William M. McCool  
Clerk of Court

s/  
Deputy Clerk

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

CASE NO. 19-5687 RJB-TLF

**Petitioner,**

## ORDER ON REPORT AND RECOMMENDATION

JEFFREY A. UTTECHT,

**Respondent.**

THIS MATTER comes before the Court on the Report and Recommendation of U.S.

Magistrate Judge Theresa L. Fricke. Dkt. 10. The Court has considered the Report and Recommendation, objections, and the remaining file.

In this 28 U.S.C. § 2254 habeas corpus petition, the Petitioner challenges a state court conviction of one count of rape in the second degree, two counts of incest in the first degree, and one count of incest in the second degree and the resulting 240-month sentence. Dkt. 1. The Petitioner filed a direct appeal, *State v. Allred*, 4 Wash.App.2d 1040 (2018), and the Court of Appeals of Washington, Division Two, affirmed the superior court. On October 31, 2018, the

1 Washington Supreme Court denied his petition for review. *State v. Allred*, 191 Wash.2d 1024  
2 (2018). The mandate issued on November 21, 2018.

3 On October 8, 2019, the Report and Recommendation was filed, recommending that this  
4 petition be denied without prejudice for failing to exhaust state court remedies on any of the  
5 claims. Dkt. 10. It also recommends denial of all motions as moot. *Id.*

6 “State prisoners seeking a writ of habeas corpus from a federal court must first exhaust  
7 their remedies in state court. A petitioner has exhausted his federal claims when he has fully and  
8 fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir.  
9 2014)(citing 28 U.S.C. § 2254(b)(1)(A) and *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45, 119  
10 S.Ct. 1728 (1999)).

11 The Report and Recommendation (Dkt. 10) should be adopted. The Petitioner has not  
12 fully presented any of his claims to the state courts. The Petitioner has failed to exhaust his state  
13 court remedies as required by 28 U.S.C. § 2254(b)(1)(A). This federal habeas action is  
14 premature.

15 Under *Rhines v. Weber*, 544 U.S. 269, 276 (2005), a district court has discretion to stay a  
16 petition with both exhausted and unexhausted claims to allow the petitioner time to present his  
17 unexhausted claims to state courts. In the Ninth Circuit, a “district court has the discretion to  
18 stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in  
19 *Rhines*.” *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016). A stay and abeyance under *Rhines* is  
20 available when: (1) “the petitioner had good cause for his failure to exhaust,” (2) the petitioner’s  
21 “unexhausted claims are potentially meritorious,” and (3) “there is no indication that the  
22 petitioner engaged in intentionally dilatory litigation tactics.” *Rhines*, at 278.

23  
24

1 Petitioner does not request a stay here. In his objections, the Petitioner maintains that the  
2 state courts do not have jurisdiction to decide his claims. Dkt. 11. The Petitioner fails to cite any  
3 authority that supports his position. His remaining assertions are without merit and do not  
4 provide a basis to reject the Report and Recommendation. Further, there is no showing that a  
5 stay, rather than dismissal, is appropriate. There is no showing that the petitioner had good cause  
6 for his failure to exhaust. *Rhines*, at 278. Further, it is unclear whether the “unexhausted claims  
7 are potentially meritorious.” *Rhines*, at 278. While “there is no indication that the petitioner  
8 engaged in intentionally dilatory litigation tactics,” *Rhines*, at 278, there are no other grounds to  
9 stay the case and hold it in abeyance rather than dismissing it without prejudice. All pending  
10 motions should be denied as moot.

11 Moreover, a certificate of appealability should not issue. As stated in the Report and  
12 Recommendation, reasonable jurists could not debate whether, or agree that, the petition should  
13 have been resolved in a different manner; the issues raised are not adequate to deserve  
14 encouragement to proceed further; and jurists of reason would not find it debatable whether the  
15 court was correct in its rulings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A Certificate of  
16 Appealability should be denied.

17 It is **ORDERED** that:

18       • The Report and Recommendation (Dkt. 10) **IS ADOPTED**;

19       • This case **IS DISMISSED WITHOUT PREJUDICE**;

20       • All pending motions **ARE DENIED AS MOOT**, and

21       • The certificate of appealability **IS DENIED**.

22       The Clerk is directed to send uncertified copies of this Order to Judge Christel, all  
23 counsel of record, and to any party appearing *pro se* at said party’s last known address.

1 Dated this 4<sup>th</sup> day of November, 2019.  
2  
3  
4



5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

ROBERT J. BRYAN  
United States District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER ALLRED,

CASE NO. 19-5687 RJB-TLF

Petitioner,

ORDER DENYING MOTION FOR  
RECONSIDERATION

JEFFREY A. UTTECHT,

### Respondent.

THIS MATTER comes before the Court on Petitioner's Motion for Reconsideration.

Dkt. 14. The Court has considered the motion and the remaining file.

In this 28 U.S.C. § 2254 habeas corpus petition, the Petitioner challenges a state court conviction of one count of rape in the second degree, two counts of incest in the first degree, and one count of incest in the second degree and the resulting 240-month sentence. Dkt. 1. The Petitioner filed a direct appeal, *State v. Allred*, 4 Wash.App.2d 1040 (2018), and the Court of Appeals of Washington, Division Two, affirmed the superior court. On October 31, 2018, the Washington Supreme Court denied his petition for review. *State v. Allred*, 191 Wash.2d 1024 (2018). The mandate issued on November 21, 2018.

1       On October 8, 2019, the Report and Recommendation was filed, recommending that this  
2 petition be denied without prejudice for failing to exhaust state court remedies on any of the  
3 claims. Dkt. 10. It also recommended denial of all motions as moot. *Id.* On November 4, 2019,  
4 the Report and Recommendation was adopted, the case dismissed, and a certificate of  
5 appealability was denied. Dkt. 12.

6       On December 3, 2019, Petitioner filed the instant Motion for Reconsideration (Dkt. 14)  
7 and two other motions: a “Motion for Petitioner Initiated Summary Judgment” (Dkt. 15) and a  
8 “Motion to Compel for Information (Show Cause)” (Dkt. 16). The last two motions are not yet  
9 ripe for consideration. In his Motion for Reconsideration, the Petitioner seeks reconsideration of  
10 the order adopting the Report and Recommendation, asserts that the federal courts have  
11 jurisdiction over his case, and that the state courts do not. Dkt. 14. As he argued in his original  
12 pleading, the Petitioner again maintains that:

13       The United States Constitution clearly and unambiguously requires an indictment  
14 by a Grand Jury before a person can be held to answer for a capital or infamous  
15 crime and it is undeniable that Article I. Section 26 of the Washington  
Constitution directly and facially violates the laws of the United States  
Constitution and the Rights of it’s Citizens.

16 Dkt. 14, at 2 (*punctuation and capitalization in original*).

17       **Motion for Reconsideration.** Local Rule W.D. Wash. 7 (h)(1) provides: “[m]otions for  
18 reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a  
19 showing of manifest error in the prior ruling or a showing of new facts or legal authority which  
20 could not have been brought to its attention earlier with reasonable diligence.”

21       Petitioner’s Motion for Reconsideration (Dkt. 14) should be denied. “State prisoners  
22 seeking a writ of habeas corpus from a federal court must first exhaust their remedies in state  
23 court. A petitioner has exhausted his federal claims when he has fully and fairly presented them

1 to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014)(citing 28 U.S.C. §  
2  
2254(b)(1)(A) and *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45, 119 S.Ct. 1728, 144 L.Ed.2d 1  
3 (1999)). As stated in the prior order, the Petitioner has not fully presented any of his claims to  
4 the state appellate courts. The Petitioner has failed to exhaust his state court remedies as  
5 required by 28 U.S.C. § 2254(b)(1)(A). The authority Petitioner’ cites does not support his  
6 position that he need not exhaust his claims in state court. His remaining assertions are without  
7 merit. The Petitioner has failed to point to a “manifest error in the prior ruling” or “new facts or  
8 legal authority which could not have been brought to [the court’s] attention earlier with  
9 reasonable diligence.” His motion (Dkt. 14) should be denied.

10 **Other Pending Motions.** Petitioner’s additional pending motions should be denied as  
11 moot. This petition was dismissed over a month ago.

12 **Future Pleadings.** Other than pleadings related to a notice of appeal, further pleadings  
13 filed by the Petitioner in this case will be docketed by the Clerk of the Court, but no further  
14 action will be taken on them.

15 It is **ORDERED** that:

16 • The Petitioner’s Motion for Reconsideration (Dkt. 14) **IS DENIED**;  
17 • All pending motions **ARE DENIED AS MOOT**; and  
18 • This case **IS DISMISSED WITHOUT PREJUDICE**.

19 The Clerk is directed to send uncertified copies of this Order to Judge Christel, all  
20 counsel of record, and to any party appearing *pro se* at said party’s last known address.

21 Dated this 5<sup>th</sup> day of December, 2019.

22   
23

24 ROBERT J. BRYAN  
United States District Judge

### Supplemental Data

Petitioner was denied, by the District Court, for failing to exhaust state remedies in his Habeas petition. However, the District Court did recognize the similarities between Petitioner's petition and other similar petitions (See: Appendix E, line 13).

To date, Petitioner's Writ of Habeas Corpus claims are similar to other "similar petitions by different petitioners presenting the same grounds for relief," including the Habeas petition submitted by Scott A. Fischer, Case No.: 2:20-cv-00051-TSZ.

"To be properly filed, a claim must have been exhausted at the time of filing" (See: Appendix E, line 3). According to the "Vicarious Exhaustion of Remedies" rule "and" State v. Fischer (See: Appendix D, lines 1-13), Petitioner's Habeas petition "was" exhausted at the time of filing.

Under "Vicarious Exhaustion of Remedies" (1987): "The rule that if one member of a class satisfies a requirement to exhaust administrative remedies, that is enough for all others similarly situated to be considered as having exhausted the remedies" (Black's Law Dictionary, 11<sup>th</sup> Edition).

"Thus, the Court does not agree with the R&R that Fischer failed to exhaust his state court remedies" (See: Appendix D, lines 1-13). Due to the Court's acceptance of Fischer meeting the exhaustion of state remedies requirement, the exhaustion of state remedies must also apply, vicariously, to Petitioner; therefore, satisfying the requirement in this petition.

1 affirmed Fischer's conviction and sentence. *Id.* In the check-box form of habeas petition  
2 filed by Fischer, in response to the question of whether he sought "further review by a  
3 higher state court," *i.e.*, the Washington Supreme Court, Fischer entered an "X" in the  
4 "No" box. See Pet. at 3 (docket no. 3). The R&R relies on this answer to conclude that  
5 Fischer failed to exhaust "the remedies available in the courts of the State," see 28 U.S.C.  
6 § 2254(b)(1)(A), and to recommend that the habeas petition be dismissed without  
7 prejudice. Fischer, however, was mistaken, and he did, in fact, unsuccessfully petition to  
8 the Washington Supreme Court for discretionary review. See State v. Fischer, 154  
9 Wn.2d 1006, 113 P.3d 482 (2005). Moreover, Fischer presented two different personal  
10 restraint petitions to the Washington Court of Appeals, and certificates of finality issued  
11 on March 9, 2007, and April 21, 2017, respectively. See State v. Fischer, Nos. 58499-5-I  
12 & 75249-9-I (dockets available at <https://dw.courts.wa.gov>). Thus, the Court does not  
13 agree with the R&R that Fischer failed to exhaust his state court remedies.

14 In a footnote, the R&R notes that Fischer's habeas petition is likely barred by the  
15 one-year period of limitations set forth in 28 U.S.C. § 2244(d)(1). See R&R at 3 n.3  
16 (docket no. 4). This footnote put Fischer on notice concerning the untimeliness of his  
17 habeas petition, and Fischer has provided no argument in response. The Court concludes  
18 that, prior to Fischer's filing of the habeas petition on January 13, 2020, more than one  
19 year had elapsed since the date (April 21, 2017, at the latest) on which the judgment at  
20 issue became final by conclusion of direct, and all post-conviction or collateral, review.  
21 See 28 U.S.C. §§ 2244(d)(1)(A) & (2). Fischer has not described any "impediment" to  
22 the filing of his habeas petition, any new United States Supreme Court precedent under  
23

"Appendix D"  
[S-2]

1 Accordingly, petitioner is not eligible for federal habeas review.<sup>4</sup> <sup>5</sup> Dkt. 7, at 1-12; *see Ha Van*  
 2 *Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013) (citing *King v. Ryan*, 564 F.3d 1133, 1142  
 3 (9th Cir. 2009)) (“To be properly filed, a claim must have been exhausted *at the time of filing.*”)  
 4 (emphasis added).

5 **B. “Motion to Compel Information”**

6 In response to the Court’s order to show cause petitioner filed a document entitled  
 7 “Motion to Compel Information” which requests that the Court “order Respondent to present the  
 8 Bill of Indictment of a Grand Jury causing the order of Petitioner’s arrest and detainment, in  
 9 accordance with the 5<sup>th</sup> Amendment of the United States Constitution” and to “proceed in a  
 10 summary way” to decide the petition. Dkt. 9. Petitioner also argues that because a habeas petition  
 11 is “an original action,” and “not an appeal or a mechanism requesting the review of [his]

12  
 13 <sup>4</sup> The Court notes that several similar petitions by different petitioners presenting the same grounds for relief and  
 offering the same explanation for failure to exhaust state judicial remedies have been considered and dismissed by  
 this court prior to service, pursuant to Rule 4, based on petitioner’s failure to exhaust state judicial remedies. *See,*  
 e.g., *Duchow v. State of Washington*, Case No. 19-cv-687-RSL-MAT (W.D. Wash., June 14, 2019) (dismissal  
 without prejudice for failure to exhaust state court remedies); *Wamba v. State of Washington*, Case No. 19-cv-661-  
 TSZ-MAT (W.D. Wash., June 13, 2019) (dismissal without prejudice for failure to exhaust state court remedies);  
*Domingo v. State of Washington*, Case No. 19-cv-659-MJP-BAT (W.D. Wash., June 18, 2019) (dismissal for failure  
 to exhaust state court remedies and because grounds raised in petition are without merit); *Nguyen v. State of*  
*Washington*, Case No. 19-cv-5388-JCC-BAT (W.D. Wash., July 9, 2019) (dismissal for failure to exhaust state court  
 remedies and because grounds raised in petition are without merit); *Urbina v. State of Washington*, Case No. 19-cv-  
 648-BJR-BAT (W.D. Wash., May 21, 2019) (dismissal for failure to exhaust state court remedies and because  
 grounds raised in petition are without merit).

14  
 15 <sup>5</sup> The Court also notes that it appears that petitioner’s substantive constitutional claims also lack merit as it has long  
 been settled that there is no denial of Federal Constitutional rights involved in the substitution of the prosecuting  
 attorney’s criminal information for the grand jury’s indictment. *Hurtado v. People of State of California*, 110 U.S.  
 516 (1884) (Rejecting claim that grand jury indictment is essential to due process and that it is a violation of the  
 Fourteenth Amendment for a state to prosecute a defendant by criminal information). This rule has been specifically  
 applied to Washington’s state practice of prosecution by information. *Gaines v. Washington*, 277 U.S. 81, 48 S.Ct.  
 468, 72 L.Ed. 793 (1928); *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993); and *see Domingo*, Case No. 19-cv-  
 659-MJP-BAT (W.D. Wash., June 18, 2019) (dismissal for failure to exhaust state court remedies and because  
 grounds raised in petition are without merit); *Nguyen*, Case No. 19-cv-5388-JCC-BAT (W.D. Wash., July 9, 2019)  
 (dismissal for failure to exhaust state court remedies and because grounds raised in petition are without merit);  
*Urbina*, Case No. 19-cv-648-BJR-BAT (W.D. Wash., May 21, 2019) (dismissal for failure to exhaust state court  
 remedies and because grounds raised in petition are without merit). However, the Court need not reach the merits of  
 petitioner’s claims as it is clear from the face of the petition that he has failed to exhaust his state court remedies.