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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY MARCEL BEARD,)	1:09-cv-01750-SKO-HC
)	
Petitioner,	)	ORDER GRANTING PETITIONER'S
	)	MOTION TO AMEND THE PETITION TO
	)	NAME A PROPER RESPONDENT
v.	)	(DOC. 11)
)	
RANDY GROUNDS,	)	ORDER DIRECTING THE CLERK TO
	)	CHANGE THE NAMED RESPONDENT TO
Respondent.	)	RANDY GROUNDS
)	
_____	)	ORDER TO PETITIONER TO SHOW CAUSE
	)	IN THIRTY (30) DAYS WHY THE
	)	PETITION SHOULD NOT BE DISMISSED
	)	FOR PETITIONER'S FAILURE TO
	)	EXHAUST STATE REMEDIES
	)	(Doc. 1)

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. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on October 13, 2009 (doc. 3.) Pending before the Court is Petitioner's motion, filed on July 21, 2010, to amend the petition, as well as the petition

1 itself, which was filed in this Court on October 5, 2009.

2 I. Petitioner's Motion to Amend the Petition

3 Petitioner filed his motion in response to the Court's order
4 of July 13, 2010, granting Petitioner leave to file the motion in
5 order to name a proper Respondent.

6 Petitioner is incarcerated at the Correctional Training
7 Facility (CTF) at Soledad, California. The warden at that
8 facility is Randy Grounds. Petitioner requests that Randy
9 Grounds be named as Respondent in this matter.

10 A petitioner seeking habeas relief must name the state
11 officer having custody of him or her as the respondent to the
12 petition. Rule 2(a) of the Rules Governing Section 2254 Cases;
13 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir.1996); Stanley
14 v. California Supreme Court, 21 F.3d 359, 360 (9th Cir.1994).
15 Normally, the person having custody of the prisoner is the warden
16 of the prison because the warden has "day to day control over"
17 the prisoner. Brittingham v. United States, 982. F.2d 378, 279
18 (9th Cir.1992). Therefore, Petitioner's request is proper.

19 Accordingly, Petitioner's motion for leave to amend the
20 petition to name a proper Respondent in this matter will be
21 granted, and the Clerk will be directed to change the name of the
22 Respondent to Randy Grounds.

23 II. Screening the Petition

24 Rule 4 of the Rules Governing § 2254 Cases in the United
25 States District Courts (Habeas Rules) requires the Court to make
26 a preliminary review of each petition for writ of habeas corpus.
27 The Court must summarily dismiss a petition "[i]f it plainly
28 appears from the petition and any attached exhibits that the

1 petitioner is not entitled to relief in the district court....”
2 Habeas Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
3 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
4 1990). Habeas Rule 2(c) requires that a petition 1) specify all
5 grounds of relief available to the Petitioner; 2) state the facts
6 supporting each ground; and 3) state the relief requested.
7 Notice pleading is not sufficient; rather, the petition must
8 state facts that point to a real possibility of constitutional
9 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
10 O’Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
11 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
12 that are vague, conclusory, or palpably incredible are subject to
13 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
14 Cir. 1990).

15 Further, the Court may dismiss a petition for writ of habeas
16 corpus either on its own motion under Habeas Rule 4, pursuant to
17 the respondent's motion to dismiss, or after an answer to the
18 petition has been filed. Advisory Committee Notes to Habeas Rule
19 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
20 (9th Cir. 2001).

21 III. Exhaustion of State Court Remedies

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

1 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
2 1988).

3 A petitioner can satisfy the exhaustion requirement by
4 providing the highest state court with the necessary jurisdiction
5 a full and fair opportunity to consider each claim before
6 presenting it to the federal court, and demonstrating that no
7 state remedy remains available. Picard v. Connor, 404 U.S. 270,
8 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
9 1996). A federal court will find that the highest state court
10 was given a full and fair opportunity to hear a claim if the
11 petitioner has presented the highest state court with the claim's
12 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
13 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
14 (1992), superceded by statute as stated in Williams v. Taylor,
15 529 U.S. 362 (2000) (factual basis).

16 Additionally, the petitioner must have specifically told the
17 state court that he was raising a federal constitutional claim.
18 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
19 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala
20 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,
21 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United
22 States Supreme Court reiterated the rule as follows:

23 In Picard v. Connor, 404 U.S. 270, 275...(1971),
24 we said that exhaustion of state remedies requires that
25 petitioners "fairly presen[t]" federal claims to the
26 state courts in order to give the State the
27 "'opportunity to pass upon and correct' alleged
28 violations of the prisoners' federal rights" (some
internal quotation marks omitted). If state courts are
to 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

1 habeas petitioner wishes to claim that an evidentiary
2 ruling at a state court trial denied him the due
3 process of law guaranteed by the Fourteenth Amendment,
he must say so, not only in federal court, but in state
court.

4 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
5 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.
6 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th
7 Cir. 2001), stating:

8 Our rule is that a state prisoner has not "fairly
9 presented" (and thus exhausted) his federal claims
10 in state court unless he specifically indicated to
11 that court that those claims were based on federal law.
12 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
13 2000). Since the Supreme Court's decision in Duncan,
14 this court has held that the petitioner must make the
15 federal basis of the claim explicit either by citing
16 federal law or the decisions of federal courts, even
17 if the federal basis is "self-evident," Gatlin v. Madding,
18 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
19 Harless, 459 U.S. 4, 7... (1982)), or the underlying
20 claim would be decided under state law on the same
21 considerations that would control resolution of the claim
22 on federal grounds, see, e.g., Hiivala v. Wood, 195
23 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
24 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
25 at 865.

26 ...
27 In Johnson, we explained that the petitioner must alert
28 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, 668-69 (9th Cir. 2000), as
amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
2001).

Where none of a petitioner's claims has been presented to
the highest state court as required by the exhaustion doctrine,
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).

1 Petitioner states that he did not raise grounds C and D on
2 state habeas (pet. 5), but he does not state whether he raised
3 them in other proceedings before the California Supreme Court.
4 Petitioner's descriptions of issues raised on appeal and before
5 the California Supreme Court are vague and unclear (pet. 2).
6 Petitioner does not specifically describe the proceedings in the
7 highest state court in which he exhausted his claims.

8 Therefore, upon review of the instant petition for writ of
9 habeas corpus, it appears that Petitioner has not presented his
10 numerous claims to the California Supreme Court. If Petitioner
11 has not presented all of his claims to the California Supreme
12 Court, the Court cannot proceed to the merits of those claims.
13 28 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner
14 has presented his claims to the California Supreme Court and
15 simply neglected to inform this Court.

16 Thus, Petitioner must inform the Court if his claims have
17 been presented to the California Supreme Court, and if possible,
18 provide the Court with a copy of the petition filed in the
19 California Supreme Court, along with a copy of any ruling made by
20 the California Supreme Court. Without knowing what claims have
21 been presented to the California Supreme Court, the Court is
22 unable to proceed to the merits of the petition.

23 IV. Disposition

24 Accordingly, it is ORDERED that:

25 1) Petitioner's motion for leave to amend the petition to
26 name Randy Grounds as Respondent in this matter is GRANTED, and

27 2) The Clerk of Court is DIRECTED to change the name of
28 Respondent to Randy Grounds; and

1 3) Petitioner is ORDERED to show cause why the petition
2 should not be dismissed for Petitioner's failure to exhaust state
3 remedies. Petitioner is ORDERED to inform the Court what claims
4 have been presented to the California Supreme Court within thirty
5 (30) days of the date of service of this order.

6 Petitioner is forewarned that failure to follow this order
7 will result in dismissal of the petition pursuant to Local Rule
8 110.

9
10 IT IS SO ORDERED.

11 **Dated: September 15, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE