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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TAHEE ABD RASHEED,)	1:09-CV-00415 GSA HC
)	
Petitioner,)	ORDER TO SHOW CAUSE
)	
v.)	ORDER GRANTING PETITIONER LEAVE TO
)	AMEND PETITION AND NAME A PROPER
CORRECTIONAL COUNSELOR)	RESPONDENT
ULLRICH,)	
)	
Respondent.)	

Petitioner is a state prisoner proceeding pro se. On February 27, 2009, he filed a petition challenging his detention at Kern Valley State Prison. He claims he was scheduled for release on February 12, 2009, but was wrongfully placed in administrative segregation within the prison instead. Because Petitioner challenges his detention, the Court hereby construes his filing as a petition for writ of habeas corpus.

DISCUSSION

I. Preliminary Review of Petition

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing 2254

1 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas
2 corpus should not be dismissed without leave to amend unless it appears that no tenable claim for
3 relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

4 II. Exhaustion

5 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
6 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
7 exhaustion doctrine is based on comity to the state court and gives the state court the initial
8 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
9 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
10 1163 (9th Cir. 1988).

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); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
14 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
15 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
16 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
17 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

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

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

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

2 Our rule is that a state prisoner has not "fairly presented" (and thus
3 exhausted) his federal claims in state court *unless he specifically indicated to*
4 *that court that those claims were based on federal law.* See Shumway v. Payne,
5 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
6 Duncan, this court has held that the *petitioner must make the federal basis of the*
7 *claim explicit either by citing federal law or the decisions of federal courts, even*
8 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
9 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
10 underlying claim would be decided under state law on the same considerations
11 that would control resolution of the claim on federal grounds. Hiiivala v. Wood,
12 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
13 (9th Cir. 1996);

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

18 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

19 In the instant petition, Petitioner fails to state whether he has sought relief in the California
20 Supreme Court. If in fact he has not sought relief, his claims are unexhausted and the petition must
21 be dismissed. 28 U.S.C. § 2254(b)(1). It is possible that he has sought relief and failed to inform this
22 Court. Therefore, the Court will order Petitioner to show cause why the petition should not be
23 dismissed for failure to exhaust state remedies. If possible, Petitioner is directed to provide copies of
24 his state petitions.

25 III. Proper Respondent

26 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer
27 having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254
28 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme
Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated
petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has
"day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.
1992); see also, Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the
chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21
F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or
parole officer and the official in charge of the parole or probation agency or state correctional

1 agency. Id.

2 In this case, Petitioner names a correctional counselor as Respondent. This individual is not
3 the correct respondent because he/she is not the official in "day-to-day control" over Petitioner. That
4 would be the warden of the institution.

5 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for
6 lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326
7 (9th Cir. 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).
8 However, the Court will give Petitioner the opportunity to cure this defect by amending the petition
9 to name a proper respondent, such as the warden of his facility. See West v. Louisiana, 478 F.2d
10 1026, 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc)
11 (allowing petitioner to amend petition to name proper respondent); Ashley v. State of Washington,
12 394 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial economy, Petitioner need not file an
13 amended petition. Instead, Petitioner may file a motion entitled "Motion to Amend the Petition to
14 Name a Proper Respondent" wherein Petitioner may name the proper respondent in this action.

15 **ORDER**

16 Accordingly, IT IS HEREBY ORDERED:

17 1) Petitioner is ORDERED to show cause within thirty (30) days from the date of service of
18 this order why the petition should not be dismissed for failure to exhaust state remedies; and

19 2) Petitioner is GRANTED thirty (30) days from the date of service of this order in which to
20 file a motion to amend the instant petition and name a proper respondent. Failure to amend the
21 petition and state a proper respondent will result in a recommendation that the petition be dismissed
22 for lack of jurisdiction.

23
24 IT IS SO ORDERED.

25 Dated: April 13, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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