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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN DEAN PARKS,)	1:10-cv-00829-SKO-HC
)	
Petitioner,	)	ORDER GRANTING PETITIONER'S
	)	MOTION TO AMEND THE PETITION
	)	(DOC. 9)
v.)	
	)	ORDER DIRECTING THE CLERK TO
STATE OF CALIFORNIA, et al.,	)	CHANGE THE NAME OF THE RESPONDENT
	)	TO KATHLEEN ALLISON
Respondents.)	
	)	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 May 27, 2010 (doc. 7). Pending before the Court are the Petitioner's motion to amend the petition to name a proper respondent (doc. 9), and the petition

1 (doc. 1).

2 I. Motion to Amend the Petition

3 Petitioner's motion to amend was filed on August 4, 2010, in
4 response to the Court's order of July 26, 2010, granting
5 Petitioner leave to file the motion. Although Petitioner
6 submitted the motion on a petition form, the form appears to
7 repeat all the information in the original petition but omits the
8 exhibits. The Court therefore understands and CONSTRUES
9 Petitioner's document as the motion to amend the petition
10 contemplated by the Court's order of July 26, 2010, and not as an
11 amended petition itself.

12 Petitioner requests that Kathleen Allison be named as
13 Respondent in this matter. Kathleen Allison acts as warden at
14 the California Substance Abuse Treatment Facility in Corcoran,
15 where Petitioner is housed.

16 A petitioner seeking habeas relief must name the state
17 officer having custody of him or her as the respondent to the
18 petition. Rule 2(a) of the Rules Governing Section 2254 Cases;
19 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir.1996); Stanley
20 v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).
21 Normally, the person having custody of the prisoner is the warden
22 of the prison because the warden has "day to day control over"
23 the prisoner. Brittingham v. United States, 982 F.2d 378, 279
24 (9th Cir.1992). Therefore, Petitioner's request is proper.

25 Accordingly, Petitioner's motion for leave to amend the
26 petition to name Kathleen Allison as Respondent in this matter is
27 GRANTED.

1 The Clerk of Court is DIRECTED to change the name of
2 Respondent to Kathleen Allison.

3 II. Screening the Petition

4 Rule 4 of the Rules Governing § 2254 Cases in the United
5 States District Courts (Habeas Rules) requires the Court to make
6 a preliminary review of each petition for writ of habeas corpus.
7 The Court must summarily dismiss a petition "[i]f it plainly
8 appears from the petition and any attached exhibits that the
9 petitioner is not entitled to relief in the district court...."
10 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
11 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
12 1990).

13 The Court may dismiss a petition for writ of habeas corpus
14 either on its own motion under Rule 4, pursuant to the
15 respondent's motion to dismiss, or after an answer to the
16 petition has been filed. Advisory Committee Notes to Habeas Rule
17 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
18 (9th Cir. 2001). A petition for habeas corpus should not be
19 dismissed without leave to amend unless it appears that no
20 tenable claim for relief can be pleaded were such leave granted.
21 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

22 III. Exhaustion of State Court Remedies

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

1 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
2 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
3 1988).

4 A petitioner can satisfy the exhaustion requirement by
5 providing the highest state court with the necessary jurisdiction
6 a full and fair opportunity to consider each claim before
7 presenting it to the federal court, and demonstrating that no
8 state remedy remains available. Picard v. Connor, 404 U.S. 270,
9 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
10 1996). A federal court will find that the highest state court
11 was given a full and fair opportunity to hear a claim if the
12 petitioner has presented the highest state court with the claim's
13 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
14 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
15 (1992), superceded by statute as stated in Williams v. Taylor,
16 529 U.S. 362 (2000) (factual basis).

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

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

1 alerted to the fact that the prisoners are asserting
2 claims under the United States Constitution. If a
3 habeas petitioner wishes to claim that an evidentiary
4 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.

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

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

27 ...

28 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, 668-69 (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,

1 481 (9th Cir. 2001). The authority of a court to hold a mixed
2 petition in abeyance pending exhaustion of the unexhausted claims
3 has not been extended to petitions that contain no exhausted
4 claims. Raspberry, 448 F.3d at 1154.

5 In the petition, Petitioner challenges as a denial of his
6 due process rights the decision of the California Board of Parole
7 Hearings finding him unsuitable for parole on March 25, 2009.
8 Petitioner states that he filed a document in the state court in
9 which he was convicted (Pet. 2) and in the state intermediate
10 appellate court (Pet. 3). He also attached to the petition an
11 order of the California Supreme Court denying his petition for
12 writ of habeas corpus on March 24, 2010. However, Petitioner
13 also states that he does have a matter pending before the
14 intermediate appellate court. It appears that this relates to a
15 robbery count and dismissal. However, it is not clear that
16 Petitioner has exhausted the claims concerning the parole
17 suitability determination that he challenges in the petition. He
18 does not specifically describe the proceedings in the state
19 courts in which he exhausted his claims. Therefore, upon review
20 of the instant petition for writ of habeas corpus, it appears
21 that Petitioner has not presented his claims concerning the
22 parole decision to the California Supreme Court. If Petitioner
23 has not presented all of his claims to the California Supreme
24 Court, the Court cannot proceed to the merits of those claims. 28
25 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner
26 has presented his claims to the California Supreme Court and
27 simply neglected to inform this Court.

1 Thus, Petitioner must inform the Court if his claims have
2 been presented to the California Supreme Court, and if possible,
3 provide the Court with a copy of the petition filed in the
4 California Supreme Court, along with a copy of any ruling made by
5 the California Supreme Court. Without knowing what claims have
6 been presented to the California Supreme Court, the Court is
7 unable to proceed to the merits of the petition.

8 IV. Order to Show Cause

9 Accordingly, Petitioner is ORDERED to show cause why the
10 petition should not be dismissed for Petitioner's failure to
11 exhaust state remedies. Petitioner is ORDERED to inform the
12 Court what claims have been presented to the California Supreme
13 Court within thirty (30) days of the date of service of this
14 order.

15
16 IT IS SO ORDERED.

17 **Dated: September 7, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE