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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | | |
|--------------------------------|---|-----------------------------------|
| LIBER R. ANDRADE, |) | 1:10-cv-1123-SMS-HC |
| |) | |
| Petitioner, |) | ORDER DIRECTING PETITIONER TO |
| |) | FILE A SUPPLEMENT TO THE PETITION |
| v. |) | CONTAINING A VERIFICATION AND |
| |) | SIGNATURE NO LATER THAN THIRTY |
| |) | (30) DAYS AFTER THE DATE OF |
| CAL. BOARD OF PRISON HEARINGS, |) | SERVICE OF THIS ORDER |
| |) | (Doc. 1) |
| Respondent. |) | |
| |) | ORDER GRANTING PETITIONER LEAVE |
| |) | TO FILE A MOTION TO AMEND THE |
| |) | PETITION AND NAME A PROPER |
| |) | RESPONDENT NO LATER THAN THIRTY |
| |) | (30) DAYS AFTER THE DATE OF |
| |) | SERVICE OF THIS ORDER (Doc. 1) |
| |) | |
| |) | 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 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

1 Petitioner on July 1, 2010 (doc. 3).

2 Pending before the Court is the petition, which was filed on June
3 22, 2010.

4 I. Screening the Petition

5 Rule 4 of the Rules Governing § 2254 Cases in the United
6 States District Courts (Habeas Rules) requires the Court to make
7 a preliminary review of each petition for writ of habeas corpus.
8 The Court must summarily dismiss a petition "[i]f it plainly
9 appears from the petition and any attached exhibits that the
10 petitioner is not entitled to relief in the district court...."
11 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
12 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
13 1990). Habeas Rule 2(c) requires that a petition 1) specify all
14 grounds of relief available to the Petitioner; 2) state the facts
15 supporting each ground; and 3) state the relief requested.
16 Notice pleading is not sufficient; rather, the petition must
17 state facts that point to a real possibility of constitutional
18 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
19 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
20 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
21 that are vague, conclusory, or palpably incredible are subject to
22 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
23 Cir. 1990).

24 Further, the Court may dismiss a petition for writ of habeas
25 corpus either on its own motion under Habeas Rule 4, pursuant to
26 the respondent's motion to dismiss, or after an answer to the
27 petition has been filed. Advisory Committee Notes to Habeas Rule
28 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43

1 (9th Cir. 2001).

2 II. Formal Defects in the Petition

3 The portion of the petition containing arguments (pet. 7-16)
4 is respectfully submitted and bears the signature of Petitioner.
5 (Pet. 16.) However, the verification portion of the petition
6 form is not signed. (Pet. 6.) Thus, the petition itself is not
7 signed or declared to be true under penalty of perjury.

8 Rule 2(c)(5) of the Rules Governing Section 2254 Cases
9 (Habeas Rules) requires a petition for writ of habeas corpus to
10 "be signed under penalty of perjury by the petitioner...."

11 III. Order to Submit a Supplement to the Petition

12 In light of the difficulty in having Petitioner submit an
13 entire new petition because the petition was not signed under
14 penalty of perjury, Petitioner is DIRECTED to submit to this
15 Court no later than thirty (30) days after the date of service of
16 this order a document entitled "Supplement to the Petition" that
17 is labeled with the case number of the present proceeding and
18 which is to consist of a declaration in which Petitioner declares
19 under penalty of perjury under the laws of the United States of
20 America that the matters alleged in the petition filed in this
21 proceeding on June 22, 2010, are true and correct. The
22 declaration must indicate the date it was executed, and it must
23 be signed by Petitioner. See 28 U.S.C. § 1746.

24 IV. Petitioner's Failure to Name a Proper Respondent

25 In this case, Petitioner is an inmate of the California
26 Substance Abuse and Treatment Facility at Corcoran (CSATF).
27 Petitioner challenges the state parole authorities' decision on
28 or about May 23, 2007, to deny parole to Petitioner. Petitioner

1 named as Respondent the "Cal. Board of Prison Hearings." (Pet.
2 1.)

3 A petitioner seeking habeas corpus relief under 28 U.S.C.
4 § 2254 must name the state officer having custody of him as the
5 respondent to the petition. Habeas Rule 2(a); Ortiz-Sandoval v.
6 Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California
7 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the
8 person having custody of an incarcerated petitioner is the warden
9 of the prison in which the petitioner is incarcerated because the
10 warden has "day-to-day control over" the petitioner and thus can
11 produce the petitioner. Brittingham v. United States, 982 F.2d
12 378, 379 (9th Cir. 1992); see also, Stanley v. California Supreme
13 Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the chief
14 officer in charge of state penal institutions is also
15 appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360.
16 Where a petitioner is on probation or parole, the proper
17 respondent is his probation or parole officer and the official in
18 charge of the parole or probation agency or state correctional
19 agency. Id.

20 The warden at CSATF is Kathleen Allison.

21 Here, Petitioner did not name the proper official.
22 Petitioner's failure to name a proper respondent requires
23 dismissal of his habeas petition for lack of jurisdiction.
24 Stanley, 21 F.3d at 360.

25 However, the Court will give Petitioner the opportunity to
26 cure this defect by amending the petition to name a proper
27 respondent. See, In re Morris, 363 F.3d 891, 893-94 (9th Cir.
28 2004). In the interest of judicial economy, Petitioner need not

1 file an amended petition. Instead, Petitioner may file a motion
2 entitled "Motion to Amend the Petition to Name a Proper
3 Respondent" wherein Petitioner may name the proper respondent in
4 this action.

5 V. Order Granting Leave to Petitioner to File a Motion to
6 Amend the Petition

7 Accordingly, Petitioner is GRANTED thirty (30) days from the
8 date of service of this order in which to file a motion to amend
9 the instant petition and name a proper respondent. Failure to
10 amend the petition and state a proper respondent will result in a
11 recommendation that the petition be dismissed for lack of
12 jurisdiction.

13 VI. Failure to Allege Exhaustion of State Court Remedies

14 Petitioner argues that his constitutional rights were
15 violated by a decision of the state parole authorities.
16 Petitioner raises the following four claims: 1) the decision was
17 not supported by some evidence that Petitioner remained a current
18 threat to society and thus violated Petitioner's right to due
19 process of law, 2) the presence of law enforcement officers on
20 the board rendered it biased, and thus his right to a neutral
21 hearing body was infringed, 3) Petitioner was denied his right to
22 a jury trial in view of the length of his incarceration, and 4)
23 Petitioner has a protected liberty interest. (Pet. 4-8.) The
24 Court understands that the first and fourth claims relate to
25 Petitioner's claim of a violation of due process of law and in
26 essence constitute a single claim.

27 A petitioner who is in state custody and wishes to challenge
28 collaterally a decision by a petition for writ of habeas corpus

1 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
2 The exhaustion doctrine is based on comity to the state court and
3 gives the state court the initial opportunity to correct the
4 state's alleged constitutional deprivations. Coleman v.
5 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,
6 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
7 1988).

8 A petitioner can satisfy the exhaustion requirement by
9 providing the highest state court with the necessary jurisdiction
10 a full and fair opportunity to consider each claim before
11 presenting it to the federal court, and demonstrating that no
12 state remedy remains available. Picard v. Connor, 404 U.S. 270,
13 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
14 1996). A federal court will find that the highest state court
15 was given a full and fair opportunity to hear a claim if the
16 petitioner has presented the highest state court with the claim's
17 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
18 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
19 (1992), superceded by statute as stated in Williams v. Taylor,
20 529 U.S. 362 (2000) (factual basis).

21 Additionally, the petitioner must have specifically told the
22 state court that he was raising a federal constitutional claim.
23 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
24 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala
25 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,
26 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United
27 States Supreme Court reiterated the rule as follows:

28 In Picard v. Connor, 404 U.S. 270, 275...(1971),

1 we said that exhaustion of state remedies requires that
2 petitioners "fairly presen[t]" federal claims to the
3 state courts in order to give the State the
4 "'opportunity to pass upon and correct' alleged
5 violations of the prisoners' federal rights" (some
6 internal quotation marks omitted). If state courts are
7 to be given the opportunity to correct alleged violations
8 of prisoners' federal rights, they must surely be
9 alerted to the fact that the prisoners are asserting
10 claims under the United States Constitution. If a
11 habeas petitioner wishes to claim that an evidentiary
12 ruling at a state court trial denied him the due
13 process of law guaranteed by the Fourteenth Amendment,
14 he must say so, not only in federal court, but in state
15 court.

16 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
17 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.
18 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th
19 Cir. 2001), stating:

20 Our rule is that a state prisoner has not "fairly
21 presented" (and thus exhausted) his federal claims
22 in state court unless he specifically indicated to
23 that court that those claims were based on federal law.
24 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
25 2000). Since the Supreme Court's decision in Duncan,
26 this court has held that the petitioner must make the
27 federal basis of the claim explicit either by citing
28 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, see, e.g., Hiivala v. Wood, 195
F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
at 865.

...

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).

1 Where none of a petitioner's claims has been presented to
2 the highest state court as required by the exhaustion doctrine,
3 the Court must dismiss the petition. Raspberry v. Garcia, 448
4 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
5 481 (9th Cir. 2001). The authority of a court to hold a mixed
6 petition in abeyance pending exhaustion of the unexhausted claims
7 has not been extended to petitions that contain no exhausted
8 claims. Raspberry, 448 F.3d at 1154.

9 Petitioner submitted with the petition a copy of a state
10 trial court decision on Petitioner's petition for writ of habeas
11 corpus. (Pet. 133-42.) It does not appear that all of
12 Petitioner's claims were raised in that court. Petitioner
13 submitted an order from the California Supreme Court denying a
14 petition for writ of habeas corpus on April 14, 2010. (Pet.
15 143.) However, Petitioner did not submit his petition filed in
16 the California Supreme Court, and he did not specifically
17 describe the proceedings in the state courts in which he
18 exhausted his claims. Petitioner has not shown that he exhausted
19 his state court remedies with respect to each of his several
20 claims.

21 Therefore, upon review of the instant petition for writ of
22 habeas corpus, it appears that Petitioner has not presented his
23 numerous claims to the California Supreme Court. If Petitioner
24 has not presented all of his claims to the California Supreme
25 Court, the Court cannot proceed to the merits of those claims. 28
26 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner
27 has presented his claims to the California Supreme Court and
28 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 VII. Order to Petitioner to Show Cause Why the Petition
9 Should Not Be Dismissed for Failure to Exhaust State
Court Remedies

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

16 Further, Petitioner is INFORMED that a failure to comply
17 timely with this order will be considered to be a failure to
18 comply with an order of the Court pursuant to Local Rule 110, and
19 it will result in dismissal of the action.

20
21 IT IS SO ORDERED.

22 **Dated: January 20, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE