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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RANDOLPH TAMIO MANSFIELD,

1:10-cv-01525-LJO-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF
PETITION WITHOUT PREJUDICE FOR
FAILURE TO EXHAUST STATE JUDICIAL
REMEDIES

v.

F. GONZALES

[Doc. 11]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On September 9, 2010, the Court issued an order to show cause why the petition should be dismissed for lack of jurisdiction, namely, the failure to name a proper respondent and failure to exhaust state judicial remedies.

DISCUSSION

On October 6, 2010, Petitioner filed an amended petition for writ of habeas corpus properly naming Warden Gonzales as Respondent. However, from a review of the amended petition it appears that Petitioner has not exhausted the state judicial remedies and Petitioner does not indicate otherwise. Accordingly, dismissal of the petition without prejudice is warranted.

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial

1 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
2 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.
3 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

4 A petitioner can satisfy the exhaustion requirement by providing the highest state court
5 with a full and fair opportunity to consider each claim before presenting it to the federal court.
6 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,
7 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair
8 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
9 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal
10 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).
11 Additionally, the petitioner must have specifically told the state court that he was raising a
12 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133
13 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the trial court
14 violated his due process rights “he must say so, not only in federal court but in state court.”
15 Duncan, 513 U.S. at 366, 115 S.Ct. at 888.

16 RECOMMENDATION

17 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 18 1. The instant petition for writ of habeas corpus be DISMISSED without prejudice;
- 19 and
- 20 2. The Clerk of Court be directed to terminate this action in its entirety.

21 This Findings and Recommendation is submitted to the assigned United States District
22 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
23 Local Rules of Practice for the United States District Court, Eastern District of California.

24 Within thirty (30) days after being served with a copy, any party may file written objections with
25 the court and serve a copy on all parties. Such a document should be captioned “Objections to
26 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served
27 and filed within fourteen (14) days after service of the objections. The Court will then review the
28 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that

1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 IT IS SO ORDERED.

4 **Dated: October 15, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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