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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID JOHNSON,

1:10-cv-02150-SMS (HC)

Petitioner,

ORDER DISMISSING PETITION FOR WRIT
OF HABEAS CORPUS AND GRANTING
PETITIONER LEAVE TO AMEND

v.

[Doc. 1]

UNKNOWN,

Respondent.

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Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed the instant petition for writ of habeas corpus on May 6, 2010, in the United States District Court for the Northern District of California. On November 16, 2010, the petition was transferred to this Court. The Court has conducted a preliminary review of the Petition and for the reasons explained below finds it is without jurisdiction to hear the case.

DISCUSSION

A. Procedural Grounds for Summary Dismissal

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the

1 respondent's motion to dismiss, or after an answer to the petition has been filed. A petition for
2 habeas corpus should not be dismissed without leave to amend unless it appears that no tenable
3 claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th
4 Cir. 1971).

5 B. Failure to Name Proper Respondent

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

18 In this case, Petitioner has not named a Respondent. Petitioner's failure to name a proper
19 respondent requires dismissal of his habeas petition for lack of jurisdiction. Stanley, 21 F.3d at
20 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir. 1970); see, also, Billiteri v.
21 United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976). However, in this case, the Court
22 will give petitioner the opportunity to cure his defect by amending the petition to name a proper
23 respondent. See West v. Louisiana, 478 F.2d 1026, 1029 (5th Cir.1973), *vacated in part on other*
24 *grounds*, 510 F.2d 363 (5th Cir.1975) (en banc) (allowing petitioner to amend petition to name
25 proper respondent); Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968) (same).

26 Petitioner is advised that the current warden of Pleasant Valley State Prison is James A. Yates.

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1 C. Failure to Exhaust State Remedies

2 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
3 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
4 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
5 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
6 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.
7 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

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

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

25 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
26 of state remedies requires that petitioners "fairly presen[t]" federal claims to the
27 state courts in order to give the State the "opportunity to pass upon and correct
28 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 alerted to the fact that the prisoners
are asserting claims under the United States Constitution. If a habeas petitioner

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

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

4 Our rule is that a state prisoner has not "fairly presented" (and thus
5 exhausted) his federal claims in state court *unless he specifically indicated to*
6 *that court that those claims were based on federal law.* See Shumway v. Payne,
7 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
8 Duncan, this court has held that the *petitioner must make the federal basis of the*
9 *claim explicit either by citing federal law or the decisions of federal courts, even*
10 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
11 (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
12 that would control resolution of the claim on federal grounds. Hiiivala v. Wood,
13 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
14 (9th Cir. 1996);

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

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

20 In this case, Petitioner fails to state that he has sought relief in the California Supreme
21 Court. Assuming he has not done so, the instant petition is unexhausted and must be dismissed.

22 D. Signature Under Penalty of Perjury

23 Petitioner did not sign the petition. Local Rule 7-131 requires a document submitted to
24 the Court for filing to include an original signature. In addition, Rule 2 of the Rules Governing
25 Section 2254 Cases requires a petition for writ of habeas corpus to "be signed under penalty of
26 perjury by the petitioner." Rule 2(c), Rules Governing Section 2254 Cases. Accordingly,
27 Petitioner must sign the petition under penalty of perjury.

28 ORDER

Accordingly, it is HEREBY ORDERED that:

1. The petition for writ of habeas corpus is DISMISSED;
2. The Clerk of Court is DIRECTED to send Petitioner a blank § 2254 petition;
3. Petitioner is granted thirty (30) days from the date of service of this order to file
an amended petition in compliance with this order; and

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1 4. Failure to comply with this order will result in a recommendation that the action
2 be dismissed for failure to comply with a court order. Local Rule 110.

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4 IT IS SO ORDERED.

5 **Dated:** December 1, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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