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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GEORGE JACOBS IV,)	1:11-cv-00934-SKO-HC
)	
Petitioner,)	ORDER TO PETITIONER TO SHOW CAUSE
)	IN THIRTY (30) DAYS WHY THE
v.)	PETITION SHOULD NOT BE DISMISSED
)	FOR PETITIONER'S FAILURE TO
)	EXHAUST STATE REMEDIES
SUSAN HUBBARD, Warden, et al.,)	(Doc. 1)
)	
Respondents.)	
)	
)	

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. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 303. Pending before the Court is Petitioner's petition, which was filed in this Court on June 9, 2011.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the

1 petitioner is not entitled to relief in the district court....”
2 Habeas Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
3 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
4 1990). Habeas Rule 2(c) requires that a petition 1) specify all
5 grounds of relief available to the Petitioner; 2) state the facts
6 supporting each ground; and 3) state the relief requested.
7 Notice pleading is not sufficient; rather, the petition must
8 state facts that point to a real possibility of constitutional
9 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
10 O’Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
11 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition
12 that are vague, conclusory, or palpably incredible are subject to
13 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
14 Cir. 1990).

15 Further, the Court may dismiss a petition for writ of habeas
16 corpus either on its own motion under Habeas Rule 4, pursuant to
17 the respondent's motion to dismiss, or after an answer to the
18 petition has been filed. Advisory Committee Notes to Habeas Rule
19 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
20 (9th Cir. 2001).

21 II. Exhaustion of State Court Remedies

22 A petitioner who is in state custody and wishes to challenge
23 collaterally a conviction by a petition for writ of habeas corpus
24 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
25 The exhaustion doctrine is based on comity to the state court and
26 gives the state court the initial opportunity to correct the
27 state's alleged constitutional deprivations. Coleman v.
28 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,

1 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
2 1988).

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

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

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

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

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

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

26 ...

27 In Johnson, we explained that the petitioner must alert
28 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,
481 (9th Cir. 2001). The authority of a court to hold a mixed

1 petition in abeyance pending exhaustion of the unexhausted claims
2 has not been extended to petitions that contain no exhausted
3 claims. Raspberry, 448 F.3d at 1154.

4 Where some claims are exhausted and others are not (i.e., a
5 "mixed" petition), the Court must dismiss the petition without
6 prejudice to give Petitioner an opportunity to exhaust the
7 unexhausted claims if he can do so. Rose, 455 U.S. at 510, 521-
8 22; Calderon v. United States Dist. Court (Gordon), 107 F.3d 756,
9 760 (9th Cir. 1997), en banc, cert. denied, 118 S.Ct. 265 (1997);
10 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997),
11 cert. denied, 117 S.Ct. 1794 (1997). However, the Court must
12 give a petitioner an opportunity to amend a mixed petition to
13 delete the unexhausted claims and permit review of properly
14 exhausted claims. Rose v. Lundy, 455 U.S. at 520; Calderon v.
15 United States Dist. Ct. (Taylor), 134 F.3d 981, 986 (9th Cir.
16 1998), cert. denied, 525 U.S. 920 (1998); James v. Giles, 221
17 F.3d 1074, 1077 (9th Cir. 2000).

18 Here, Petitioner alleges that he is an inmate of the
19 Corcoran State Prison serving a sentence of fifty-four (54) years
20 to life for convictions on multiple counts of violating Cal. Pen.
21 Code §§ 4501, 4501.5, 4502, and 4500 sustained in the Kings
22 County Superior Court on January 8, 2010. (Pet. 1.) Petitioner
23 alleges four claims in the petition: 1) with respect to
24 Petitioner's conviction in count 2 of battery by a prisoner on a
25 non-confined person in violation of Cal. Pen. Code § 4501.5, the
26 evidence failed to establish that Petitioner wilfully touched the
27 victim in a harmful of offensive manner; 2) a concurrent prison
28 term imposed on count four 4, possession of a deadly and

1 dangerous weapon by an inmate in violation of Cal. Pen. Code §
2 4502(a), must be stayed because the evidence failed to
3 demonstrate that Petitioner possessed a sharp instrument at any
4 time other than when assaulted and battered correctional
5 officers; 3) the trial court abused its discretion by imposing a
6 consecutive sentence on count 6, aggravated assault while serving
7 a life sentence in violation of Cal. Pen. Code § 4500, instead of
8 imposing a concurrent term; and 4) Petitioner's sentence
9 constituted cruel and unusual punishment under the state and
10 federal constitutions. (Pet. 6-9.)

11 With respect to Petitioner's presentation of his claims to
12 the state courts, Petitioner alleges that he presented two issues
13 to the California Supreme Court: 1) the evidence failed to
14 establish beyond a reasonable doubt that Petitioner wilfully
15 touched the victim in a harmful or offensive manner; and 2)
16 Petitioner's sentence of fifty-four (54) years to life with a
17 determinate term of forty (40) years constituted cruel and
18 unusual punishment in violation of the state and federal
19 constitutions.

20 Therefore, upon review of the instant petition for writ of
21 habeas corpus, it appears that Petitioner has not presented at
22 least two of his claims to the California Supreme Court. If
23 Petitioner has not presented all his claims to the California
24 Supreme Court, the Court cannot proceed to the merits of those
25 claims. 28 U.S.C. § 2254(b)(1). It is possible, however, that
26 Petitioner has presented all his claims to the California Supreme
27 Court but has simply neglected to inform this Court.

28 ///

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

9 III. Order to Show Cause

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 as to all his claims. Petitioner is
13 ORDERED to inform the Court within thirty (30) days of the date
14 of service of this order whether or not his claims concerning
15 been presented to the California Supreme Court.

16 Petitioner is forewarned that failure to follow this order
17 will result in dismissal of the petition pursuant to Local Rule
18 110.

19
20 IT IS SO ORDERED.

21 **Dated: June 20, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE