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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICKY TYRONE FOSTER,

1:12-CV-01539 AWI BAM HC

Petitioner,

v.

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

MATTHEW CATE, Director,

Respondent.

_____ /

On September 19, 2012, Petitioner filed the instant petition for writ of habeas corpus in this Court.

DISCUSSION

I. Preliminary Review of Petition

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990).

II. Failure to State a Claim

A federal court may only grant a petition for writ of habeas corpus if the petitioner can show that "he is in custody in violation of the Constitution" 28 U.S.C. § 2254(a). A habeas corpus

1 petition is the correct method for a prisoner to challenge the “legality or duration” of his
2 confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), *quoting*, Preiser v. Rodriguez, 411
3 U.S. 475, 485 (1973); Advisory Committee Notes to Rule 1 of the Rules Governing Section 2254
4 Cases. In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 is the proper method for a
5 prisoner to challenge the conditions of that confinement. McCarthy v. Bronson, 500 U.S. 136, 141-
6 42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574; Advisory Committee Notes to Rule 1
7 of the Rules Governing Section 2254 Cases.

8 In this case, Petitioner claims prison staff have wrongfully revoked his single-cell status and
9 have determined that Petitioner will be required to share his cell with another inmate. As to this
10 claim, Petitioner is challenging the conditions of his confinement, not the fact or duration of that
11 confinement. Therefore, Petitioner is not entitled to habeas corpus relief, and the claim must be
12 dismissed. Should Petitioner wish to pursue any claims concerning his cell status, he must do so by
13 way of a civil rights complaint pursuant to 42 U.S.C. § 1983.

14 III. Failure to Exhaust State Remedies

15 Petitioner also complains that he was wrongfully found guilty in a disciplinary hearing held
16 on January 5, 2012, for refusing to accept assigned housing for which he was assessed a ninety-day
17 loss of credits. If a constitutional violation has resulted in the loss of time credits, such violation
18 affects the duration of a sentence, and the violation may be remedied by way of a petition for writ of
19 habeas corpus. Young v. Kenny, 907 F.2d 874, 876-78 (9th Cir. 1990).

20 Nevertheless, a petitioner who is in state custody seeking a writ of habeas corpus must
21 exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity
22 to the state court and gives the state court the initial opportunity to correct the state's alleged
23 constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55
24 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d
25 1158, 1163 (9th Cir. 1988).

26 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
27 full and fair opportunity to consider each claim before presenting it to the federal court. Picard v.
28 Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.

1 1996). A federal court will find that the highest state court was given a full and fair opportunity to
2 hear a claim if the petitioner has presented the highest state court with the claim's factual and legal
3 basis. Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S.
4 1 (1992) (factual basis).

5 Additionally, the petitioner must have specifically told the state court that he was raising a
6 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
7 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999);
8 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States Supreme Court
9 reiterated the rule as follows:

10 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
11 of state remedies requires that petitioners "fairly present[t]" federal claims to the
12 state courts in order to give the State the "opportunity to pass upon and correct
13 alleged violations of the prisoners' federal rights" (some internal quotation marks
14 omitted). If state courts are to be given the opportunity to correct alleged violations
15 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
16 are asserting claims under the United States Constitution. If a habeas petitioner
17 wishes to claim that an evidentiary ruling at a state court trial denied him the due
18 process of law guaranteed by the Fourteenth Amendment, he must say so, not only
19 in federal court, but in state court.

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

21 Our rule is that a state prisoner has not "fairly presented" (and thus
22 exhausted) his federal claims in state court *unless he specifically indicated to*
23 *that court that those claims were based on federal law. See Shumway v. Payne*,
24 *223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in*
25 *Duncan*, this court has held that the *petitioner must make the federal basis of the*
26 *claim explicit either by citing federal law or the decisions of federal courts, even*
27 *if the federal basis is "self-evident," Gatlin v. Madding*, 189 F.3d 882, 889
28 (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. Hiivala v. Wood,
195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
(9th Cir. 1996);

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, 668-669 (9th Cir. 2000) (italics added).

In this case, it appears from the petition and the attached exhibits that Petitioner has not
sought relief in the California Supreme Court. Therefore, the instant petition is unexhausted and
must be dismissed in order that Petitioner can return to state court to allow the state court the initial

1 opportunity to correct any constitutional deficiencies. 28 U.S.C. § 2254(b)(1).

2 **RECOMMENDATION**

3 Accordingly, the Court RECOMMENDS that Petitioner’s claims concerning his cell status
4 be DISMISSED, and the petition for writ of habeas corpus be DISMISSED on all other grounds for
5 failure to exhaust state remedies.

6 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United
7 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of
8 the Local Rules of Practice for the United States District Court, Eastern District of California.

9 Within thirty (30) days after service of the Findings and Recommendation, Petitioner may file
10 written objections with the Court. Such a document should be captioned “Objections to Magistrate
11 Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s ruling
12 pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the
13 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
14 1153 (9th Cir. 1991).

15 IT IS SO ORDERED.

16 **Dated: October 16, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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