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6 **UNITED STATES DISTRICT COURT**7
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11 EASTERN DISTRICT OF CALIFORNIA12
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ALFRED RAY NICHOLS,) Case No.:1:13-cv-00135-SAB (HC)
Petitioner,)
vs.) ORDER DISMISSING PETITION WITH
KIM HOLLAND,) LEAVE TO FILE SECOND AMENDED
Respondent.) PETITION
) ORDER DIRECTING CLERK OF COURT
) TO SEND PETITIONER BLANK PETITION
) FOR WRIT OF HABEAS CORPUS

Petitioner is 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. Local Rule 305(b).

Petitioner filed the instant petition for writ of habeas corpus on January 29, 2013.

DISCUSSION

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 face of 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). A petition for habeas corpus should not be dismissed without leave to amend unless it

1 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,
2 440 F.2d 13, 14 (9th Cir. 1971).

3 I. Failure to State Cognizable Claim

4 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241
5 of Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner
6 unless he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states:

7 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an
8 application for a writ of habeas corpus in behalf of a person in custody pursuant to a
9 judgment of a State court only on the ground that he is in custody in violation of the
10 Constitution or laws or treaties of the United States.

11 (emphasis added). See also, Rule 1 of the Rules Governing Section 2254 Cases in the United
12 States District Court. The Supreme Court has held that “the essence of habeas corpus is an
13 attack by a person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411
14 U.S. 475, 484 (1973).

15 Furthermore, in order to succeed in a petition pursuant to 28 U.S.C. § 2254, Petitioner
16 must demonstrate that the adjudication of his claim in state court resulted in a decision that was
17 contrary to, or involved an unreasonable application of, clearly established Federal law, as
18 determined by the Supreme Court of the United States; or resulted in a decision that was based
19 on an unreasonable determination of the facts in light of the evidence presented in the State court
20 proceedings. 28 U.S.C. § 2254(d)(1),(2).

21 In addition, Petitioner must state his claim with sufficient specificity. See Hendricks v.
22 Vasquez, 908 F.2d 490, 491-492 (9th Cir. 1990); Wacht v. Cardwell, 604 F.2d 1245, 1246-47
23 (9th Cir. 1979). Rule 2(c) of the Rules Governing Section 2254 Cases states:

25 The petition must:

26 (1) specify all the grounds for relief available to the petitioner;
27 (2) state the facts supporting each ground;
28 (3) state the relief requested;
 (4) be printed, typewritten, or legibly handwritten; and

1 (5) be signed under penalty of perjury by the petitioner or by a person authorized to sign
2 it for the petitioner under 28 U.S.C. § 2242.

3 The instant petition is completely deficient. The only information provided on the form
4 petition is that Petitioner is challenging a conviction from the Fresno County Superior court.
5 Petitioner did not fill out the form petition and listed no grounds for relief or any facts to support
6 such grounds. Nor does Petitioner state the relief he requests.

7 In addition, Petitioner does not allege a violation of the Constitution or federal law, nor
8 does he argue that he is in custody in violation of the Constitution or federal law. Petitioner does
9 not allege that the adjudication of his claims in state court “resulted in a decision that was
10 contrary to, or involved an unreasonable application of, clearly established Federal law, . . . or
11 resulted in a decision that was based on an unreasonable determination of the facts. . . .” 28
12 U.S.C. § 2254.

13 Therefore, the petition must be dismissed. However, Petitioner will be given an
14 opportunity to file an amended petition.

15 II. Exhaustion of State Court Remedies

16 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
17 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
18 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
19 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
20 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
21 1163 (9th Cir. 1988).

23 A petitioner can satisfy the exhaustion requirement by providing the highest state court
24 with a full and fair opportunity to consider each claim before presenting it to the federal court.
25 Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996).
26 A federal court will find that the highest state court was given a full and fair opportunity to hear
27 a claim if the petitioner has presented the highest state court with the claim's factual and legal
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1 basis. Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504
2 U.S. 1, 9 (1992) (factual basis). Additionally, the petitioner must have specifically told the state
3 court that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66; Keating v.
4 Hood, 133 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the
5 trial court violated his due process rights "he must say so, not only in federal court but in state
6 court." Duncan, 513 U.S. at 366. A general appeal to a constitutional guarantee is insufficient to
7 present the "substance" of such a federal claim to a state court. See Anderson v. Harless, 459
8 U.S. 4, 7 (1982) (Exhaustion requirement not satisfied circumstance that the "due process
9 ramifications" of an argument might be "self-evident."); Gray v. Netherland, 518 U.S. 152, 162-
10 63 (1996) ("a claim for relief in habeas corpus must include reference to a specific federal
11 constitutional guarantee, as well as a statement of the facts which entitle the petitioner to
12 relief.").

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

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

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

1 Our rule is that a state prisoner has not "fairly presented" (and thus
2 exhausted) his federal claims in state court unless he specifically indicated to
3 that court that those claims were based on federal law. See Shumway v. Payne,
4 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
5 Duncan, this court has held that the petitioner must make the federal basis of the
6 claim explicit either by citing federal law or the decisions of federal courts, even
7 if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d 882, 889
8 (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 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.

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

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

13 In this case, Petitioner fails to state whether he has exhausted the state court remedies.
14 As previously discussed, the petition fails to set forth any grounds for relief. Therefore, the
15 petition appears to be unexhausted. Such a petition must be dismissed to provide Petitioner an
16 opportunity to exhaust the claims. 28 U.S.C. § 2254(b)(1); Rose, 455 U.S. at 521-22.

17 III. Signature Under Penalty of Perjury

18 Upon review of Petitioner's petition, the Court discovered that the Petition does not
19 contain an original signature under penalty of perjury. Local Rule 131, subdivision (b) requires a
20 document submitted to the Court for filing to include an original signature. In addition, Rule 2
21 of the Rules Governing Section 2254 Cases requires a petition for writ of habeas corpus to "be
22 signed under penalty of perjury by the petitioner." Rule 2(c), Rules Governing Section 2254
23 Cases. Petitioner will be ordered to submit an amended petition to the Court that is signed under
24 penalty of perjury. The petition should contain an original signature also made under penalty of
25 perjury.

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CONCLUSION

The instant petition must be dismissed for the above-stated reasons. Petitioner will be given an opportunity to file an amended petition to cure the deficiencies. Petitioner is advised that failure to file a petition in compliance with this order (i.e., a complete petition with cognizable federal claims clearly stated, exhaustion of state remedies clearly stated, and signed under penalty of perjury) within the allotted time will result in dismissal of the case. Petitioner is advised that the amended petition should be titled “First Amended Petition” and must reference the instant case number.

ORDER

Accordingly, it is HEREBY ORDERED that:

1. The instant petition for writ of habeas corpus is hereby DISMISSED;
2. Petitioner is GRANTED thirty (30) days from the date of service of this order to file an amended petition in compliance with this order;
3. The Clerk of Court is DIRECTED to send Petitioner a form petition pursuant to 28 U.S.C. § 2254; and
4. Failure to comply with this order will result in dismissal of the action for failure to prosecute.

IT IS SO ORDERED.

Dated: **February 12, 2013**

Henry A. Ballew
UNITED STATES MAGISTRATE JUDGE