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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ABEL AGUILAR, JR.,	1:13-cv-00194-BAM (HC)
Petitioner,	ORDER DISMISSING PETITION FOR WRIT
v.	OF HABEAS CORPUS, DIRECTING CLERK
	OF COURT TO TERMINATE ACTION, AND
	DECLINING TO ISSUE A CERTIFICATE OF
HABEAS CORPUS,	APPEALABILITY
	[ECF No.8]
Respondent.	

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 February 7, 2013. On February 27, 2013, the undersigned dismissed the petition for writ of habeas corpus on February 17, 2013, for failure to state a cognizable claim, failure to exhaust the state court remedies, and failure to name a proper respondent. Petitioner was granted leave to amend the petition within thirty days from the date of service of the order.

Petitioner filed a first amended petition on March 13, 2013. As discussed below, the amended petition suffers the same deficiencies as those in the original petition and therefore dismissal without leave to amend is warranted.

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1 DISCUSSION

2 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary
3 review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it
4 plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Rule
5 4 of the Rules Governing 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
6 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it
7 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,
8 440 F.2d 13, 14 (9th Cir. 1971).

9 I. Failure to State Cognizable Claim

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

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

16 (emphasis added). See Rule 1 to the Rules Governing Section 2254 Cases in the United States
17 District Court. The Supreme Court has held that “the essence of habeas corpus is an attack by a
18 person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411 U.S. 475, 484
19 (1973).

20 Furthermore, in order to succeed in a petition pursuant to 28 U.S.C. § 2254, Petitioner
21 must demonstrate that the adjudication of his claim in state court

22 resulted in a decision that was contrary to, or involved an unreasonable application
23 of, clearly established Federal law, as determined by the Supreme Court of the
24 United States; or resulted in a decision that was based on an unreasonable
25 determination of the facts in light of the evidence presented in the State court
26 proceeding.

27 28 U.S.C. § 2254(d)(1),(2).

28 In addition, Petitioner must state his claim with sufficient specificity. See Hendricks v.
Vasquez, 908 F.2d 490, 491-492 (9th Cir. 1990); Wacht v. Cardwell, 604 F.2d 1245, 1246-1247
(9th Cir. 1979). Rule 2(c) of the Rules Governing Section 2254 Cases states:

1 The petition must:

- 2 (1) specify all the grounds for relief available to the petitioner;
3 (2) state the facts supporting each ground;
4 (3) state the relief requested;
5 (4) be printed, typewritten, or legibly handwritten; and
6 (5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it
7 for the petitioner under 28 U.S.C. § 2242.

8 The instant petition is completely deficient. Although Petitioner indicates that he is
9 attempting to challenge a 2011 conviction from the Kern County Superior Court, Petitioner did
10 not fill out the form petition. His only claim for relief states that there was false statements on
11 the probation report. Petitioner states the relief he requests.

12 Petitioner does not allege a violation of the Constitution or federal law, nor does he argue
13 that he is in custody in violation of the Constitution or federal law. Petitioner does not allege that
14 the adjudication of his claims in state court “resulted in a decision that was contrary to, or
15 involved an unreasonable application of, clearly established Federal law, ... or resulted in a
16 decision that was based on an unreasonable determination of the facts. . . .” 28 U.S.C. § 2254.
17 Therefore, the petition must be dismissed and further amendment is futile as he has previously
18 been granted leave to cure this defect. Jarvis v. Nelson, 440 F.2d at 14.

19 II. Exhaustion of State Court Remedies

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

26 A petitioner can satisfy the exhaustion requirement by providing the highest state court
27 with a full and fair opportunity to consider each claim before presenting it to the federal court.
28 Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996).
A federal court will find that the highest state court was given a full and fair opportunity to hear a
claim if the petitioner has presented the highest state court with the claim's factual and legal

1 basis. Duncan v. Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504
2 U.S. 1, 8-9 (1992) (factual basis). Additionally, the petitioner must have specifically told the
3 state court that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66, 115
4 S.Ct. at 888; Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner
5 wishes to claim that the trial court violated his due process rights "he must say so, not only in
6 federal court but in state court." Duncan, 513 U.S. at 366. A general appeal to a constitutional
7 guarantee is insufficient to present the "substance" of such a federal claim to a state court. See
8 Anderson v. Harless, 459 U.S. 4, 7 (1982) (Exhaustion requirement not satisfied circumstance
9 that the "due process ramifications" of an argument might be "self-evident."); Gray v.
10 Netherland, 518 U.S. 152, 162-63 (1996) ("a claim for relief in habeas corpus must include
11 reference to a specific federal constitutional guarantee, as well as a statement of the facts which
12 entitle the petitioner to relief.").

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

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

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

Our rule is that a state prisoner has not "fairly presented" (and thus
exhausted) his federal claims in state court *unless he specifically indicated to
that court that those claims were based on federal law. See Shumway v. Payne*,
223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
Duncan, this court has held that the *petitioner must make the federal basis of the
claim explicit either by citing federal law or the decisions of federal courts, even
if the federal basis is "self-evident," Gatlin v. Madding*, 189 F.3d 882, 889
(9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the

1 underlying claim would be decided under state law on the same considerations
2 that would control resolution of the claim on federal grounds. Hiivala v. Wood,
3 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
4 (9th Cir. 1996); Crotts, 73 F.3d at 865.

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

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

10 In this case, Petitioner fails to state whether he has exhausted the state court remedies. As
11 discussed above, the petition fails to set forth any grounds for relief. Therefore, the petition
12 appears to be unexhausted. Because Petitioner has previously been granted leave to amend the
13 petition to set forth exhaustion of the state court remedies and he has failed to do so, further
14 amendment would be futile.

15 III. Failure to Name Proper Respondent

16 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state
17 officer having custody of him as the respondent to the petition. Rule 2 (a) of the Rules
18 Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v.
19 California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having
20 custody of an incarcerated petitioner is the warden of the prison in which the petitioner is
21 incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v.
22 United States, 982 F.2d 378, 379 (9th Cir. 1992); see also Stanley v. California Supreme Court,
23 21 F.3d 359, 360 (9th Cir. 1994). However, the chief officer in charge of state penal institutions
24 is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on
25 probation or parole, the proper respondent is his probation or parole officer and the official in
26 charge of the parole or probation agency or state correctional agency. Id.

27 In this case, Petitioner failed to name a Respondent. The failure to name a proper
28 respondent requires dismissal of his habeas petition for lack of jurisdiction. Stanley, 21 F.3d at
360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir. 1970); see also Billiteri v.

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1 United States Bd. Of Parole, 541 F.2d 938, 948 (2d Cir. 1976). The Court has previously granted
2 Petitioner leave to amend the petition to cure this deficient, yet he has failed to do so.

3 IV. Certificate of Appealability

4 Rule 11(a) of the Rules Governing Section 2254 cases requires a district court to rule on
5 whether a petitioner is entitled to a certificate of appealability in the same order in which the
6 petition is denied. The requirement that a petitioner seek a certificate of appealability is a gate-
7 keeping mechanism that protects the Court of Appeals from having to devote resources to
8 frivolous issues, while at the same time affording petitioners an opportunity to persuade the
9 Court that, through full briefing and argument, the potential merit of claims may appear.

10 Lambricht v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). However, a state prisoner seeking a
11 writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his
12 petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S.
13 322, 335-336 (2003). The controlling statute, 28 U.S.C. § 2253, provides as follows:

14 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
15 judge, the final order shall be subject to review, on appeal, by the court of appeals for the
circuit in which the proceeding is held.

16 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
17 of a warrant to remove to another district or place for commitment or trial a person
18 charged with a criminal offense against the United States, or to test the validity of such
person's detention pending removal proceedings.

19 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may
not be taken to the court of appeals from--

20 (A) the final order in a habeas corpus proceeding in which the detention
21 complained of arises out of process issued by a State court; or

22 (B) the final order in a proceeding under section 2255.

23 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has
made a substantial showing of the denial of a constitutional right.

24 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue
25 or issues satisfy the showing required by paragraph (2).

26 This Court will issue a certificate of appealability when a petitioner makes a substantial
27 showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial
28 showing, the petitioner must establish that "reasonable jurists could debate whether (or, for that

1 matter, agree that) the petition should have been resolved in a different manner or that the issues
2 presented were ‘adequate to deserve encouragement to proceed further’.” Slack v. McDaniel,
3 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

4 In the present case, the Court finds that Petitioner has not made the required substantial
5 showing of the denial of a constitutional right to justify the issuance of a certificate of
6 appealability. Reasonable jurists would not find it debatable that Petitioner has failed to show an
7 entitlement to federal habeas corpus relief. Accordingly, the Court declines to issue a certificate
8 of appealability.

9 **CONCLUSION**

10 The instant petition must be dismissed for the above-stated reasons. Because Petitioner
11 has previously been granted leave to amend and failed to comply with the court’s directive
12 despite having been warned that dismissal would result, further amendment would be futile.
13 Jarvis v. Nelson, 440 F.2d at 14.

14 **ORDER**

15 Accordingly, it is HEREBY ORDERED that:

- 16 1. The instant petition for writ of habeas corpus is hereby DISMISSED;
17 2. The Clerk of Court is directed to enter judgment; and
18 3. The Court declines to issue a certificate of appealability.

19 IT IS SO ORDERED.

20 **Dated: April 19, 2013**

/s/ **Barbara A. McAuliffe**
UNITED STATES MAGISTRATE JUDGE