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| GARY FRANCIS FISHER,  | ) Case No.: 1:14-cv-00895-AWI-JLT       |
|                       | )                                       |
| Petitioner,           | ) ORDER REQUIRING PETITIONER TO SUBMIT  |
|                       | ) A SECOND AMENDED PETITION             |
| v.                    | )                                       |
|                       | ) 30-DAY DEADLINE                       |
| RICK BARRIOS, et al., | )                                       |
|                       | ) ORDER DIRECTING CLERK OF THE COURT TO |
| Respondent.           | ) SEND PETITIONER A FORM FOR FILING     |
|                       | ) HABEAS CORPUS PETITION PURSUANT TO 28 |
|                       | ) U.S.C. § 2254                         |

Petitioner is a state prisoner proceeding through retained counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## PROCEDURAL HISTORY

Petitioner filed the instant petition on March 13, 2014, in the U.S. District Court for the Northern District of California, and was transferred to this Court on May 14, 2014. (Doc. 14). It appears that Petitioner is challenging a 2010 conviction by plea of nolo contendere in the Kern County Superior Court, Bakersfield, California. Beyond that, the original petition is a collection of unrelated statements, arguments, and quotations, none of which are intelligible to the Court or comprehensible as a cognizable federal habeas claim. (Doc. 1). To the contrary, many of Petitioner’s “claims” in the original petition appear to indicate that he is asserting a civil rights complaint pursuant to 42 U.S.C. § 1983. Petitioner’s claim of “damages” supports this view.

1           However, before the Court could conduct a preliminary screening of the petition, Petitioner  
2 filed a first amended petition on June 18, 2014. (Doc. 24). The 6-page handwritten first amended  
3 petition does not appear to state any kind of claim sounding in habeas corpus. Rather, it appears to  
4 assert a need for additional court records and medical files. However, nowhere in the first amended  
5 petition are the specific records and files designated. Nor does Petitioner indicate precisely why those  
6 records and files are necessary nor to what they might pertain.

7           A. Procedural Grounds for Summary Dismissal.

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

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

11 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
12 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss,  
13 or after an answer to the petition has been filed. A petition for habeas corpus should not be dismissed  
14 without leave to amend unless it appears that no tenable claim for relief can be pleaded were such  
15 leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9<sup>th</sup> Cir. 1971).

16           B. Insufficient Information And Failure To State A Cognizable Habeas Claim.

17           A preliminary review of the first amended petition indicates that Petitioner has not provided  
18 sufficient information regarding his claims for this case to proceed.

19           The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241 of  
20 Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner unless he  
21 is "in custody in violation of the Constitution." 28 U.S.C. § 2254(a) states that the federal courts shall  
22 entertain a petition for writ of habeas corpus only on the ground that the petitioner "is in custody in  
23 violation of the Constitution or laws or treaties of the United States. See also, Rule 1 to the Rules  
24 Governing Section 2254 Cases in the United States District Court. The Supreme Court has held that  
25 "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . ."  
26 Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). Furthermore, in order to succeed in a petition pursuant  
27 to 28 U.S.C. § 2254, Petitioner must demonstrate that the adjudication of his claim in state court  
28 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

1 established Federal law, as determined by the Supreme Court of the United States; or resulted in a  
2 decision that was based on an unreasonable determination of the facts in light of the evidence  
3 presented in the State court proceeding. 28 U.S.C. § 2254(d)(1), (2).

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

9         Moreover, Petitioner has provided so little information in the first amended petition that the  
10 Court is unable to discern *any claims at all*, let alone **cognizable** federal habeas claims. Rule 2 of the  
11 Rules Governing Section 2254 Cases provides that the petition:

12                 “...shall specify all the grounds for relief which are available to the petitioner and of  
13                 which he has or by the exercise of reasonable diligence should have knowledge and shall  
                    set forth in summary form the facts supporting each of the grounds thus specified.”

14 Rule 2(c), Rules Governing Section 2254 Cases. Petitioner must also clearly state the relief sought in  
15 the petition. *Id.* Additionally, the Advisory Committee Notes to Rule 4 explains that “...’[N]otice’  
16 pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility of  
17 constitutional error.’” Advisory Committee Notes to Rule 4; see Blackledge v. Allison, 431 U.S. 63,  
18 75, n. 7, 97 S.Ct. 1621 (1977).

19         Here, Petitioner has submitted a first amended petition that fails to comply with the  
20 requirements of Rule 2(c). Indeed, the Court cannot discern any claims for relief from the information  
21 provided nor what kind of relief Petitioner might be seeking. It is Petitioner’s responsibility to specify  
22 all grounds for relief and to provide sufficient factual allegations for the Court to determine what  
23 claims Petitioner is seeking to raise and whether those claims state the kind of federal constitutional  
24 violations upon which this Court’s habeas jurisdiction is predicated. Petitioner has failed to meet these  
25 minimal pleading requirements. Accordingly, Petitioner will be required to submit a Second  
26 Amended Petition in which he clearly and succinctly sets forth all of his claims, together with  
27 supporting factual allegations, in order for this case to proceed.

1 C. Exhaustion of Remedies.

2 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
3 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
4 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 U.S.  
6 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9<sup>th</sup>  
7 Cir. 1988).

8 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
9 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.  
10 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88  
11 F.3d 828, 829 (9<sup>th</sup> Cir. 1996). In this instance, the highest state court would be the California Supreme  
12 Court. A federal court will find that the highest state court was given a full and fair opportunity to  
13 hear a claim if the petitioner has presented the highest state court with the claim's factual and legal  
14 basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715,  
15 1719 (1992) (factual basis).

16 Additionally, the petitioner must have specifically told the state court that he was raising a  
17 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th  
18 Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.1999);  
19 Keating v. Hood, 133 F.3d 1240, 1241 (9<sup>th</sup> Cir.1998).

20 Here, Petitioner has not provided any information regarding his efforts to fully exhaust his  
21 claims in the state courts. Without this information, the Court cannot proceed. In his second amended  
22 petition, Petitioner must provide the specific information regarding what claims he has raised in the  
23 California Supreme Court, when those claims were denied, and provide copies, if he has them, of the  
24 state high court's orders denying those claims.

25 D. Failure to Name A Proper Respondent.

26 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer  
27 having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254  
28 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme

1 Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated  
2 petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has  
3 “day-to-day control” over the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.  
4 1992); see also, Stanley, at 360. However, the chief officer in charge of state penal institutions is also  
5 appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on probation or  
6 parole, the proper respondent is his probation or parole officer and the official in charge of the parole  
7 or probation agency or state correctional agency. Id.

8 Here, Petitioner has named as Respondent a variety of individuals, including a federal customs  
9 agent and a state judge. However, he has not named the warden or chief officer of the institution  
10 where Petitioner is confined and, thus, the named Respondents do not have day-to-day control over  
11 Petitioner. Petitioner is presently confined at the California Health Care Facility, Stockton, California.  
12 The current director or warden of that facility is Ron Rackley. Ron Rackley is the person Petitioner  
13 should name as Respondent.

14 Petitioner’s failure to name a proper respondent requires dismissal of his habeas petition for  
15 lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326  
16 (9th Cir. 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).  
17 **However, the Court will give Petitioner the opportunity to cure this defect by amending the**  
18 **petition to name a proper respondent, such as the warden of his facility.** See West v. Louisiana,  
19 478 F.2d 1026, 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975)  
20 (en banc) (allowing petitioner to amend petition to name proper respondent); Ashley v. State of  
21 Washington, 394 F.2d 125 (9th Cir. 1968) (same). In any amended petition he might file, Petitioner  
22 must name a proper respondent.

23 Accordingly, it is HEREBY ORDERED that:

24 1. The instant first amended petition for writ of habeas corpus is hereby DISMISSED.

25 Petitioner is GRANTED 30 days from the date of service of this Order to SUBMIT a  
26 SECOND AMENDED PETITION that is in compliance with this Order. The Clerk of the  
27 Court is DIRECTED to send Petitioner a blank form petition for petitioners filing pursuant  
28 to 28 U.S.C. § 2254.

