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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANDREW MANCILLA,

Petitioner,

v.

CDC,

Respondent.

Case No. 1:14-cv-00935 GSA HC

ORDER TO SHOW CAUSE

ORDER DIRECTING PETITIONER TO
SUBMIT SIGNED DECLARATION

ORDER GRANTING PETITIONER LEAVE
TO AMEND PETITION TO NAME A
PROPER RESPONDENT

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has consented to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Petitioner filed the instant federal petition for writ of habeas corpus in the Sacramento Division of this Court on June 11, 2014. On June 18, 2014, the petition was transferred to the Fresno Division and received in this Court. Petitioner challenges a 2010 conviction sustained in Kings County Superior Court for two counts of attempted murder, three counts of assault with a deadly weapon, one count of burglary, three counts of felony vandalism, and one count of active participation in a criminal street gang.

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

1 plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the
2 Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir.
3 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it
4 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,
5 440 F.2d 13, 14 (9th Cir. 1971).

6 II. Exhaustion

7 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
8 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
9 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
10 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
11 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
12 1163 (9th Cir. 1988).

13 A petitioner can satisfy the exhaustion requirement by providing the highest state court
14 with a full and fair opportunity to consider each claim before presenting it to the federal court.
15 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);
16 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest
17 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the
18 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);
19 Kenney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992) (factual basis).

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

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

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

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

4 Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his
5 federal claims in state court unless he specifically indicated to that court that those
6 claims were based on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88
7 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held
8 that the petitioner must make the federal basis of the claim explicit either by citing
9 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 underlying claim would be decided
under state law on the same considerations that would control resolution of the
claim on federal grounds. Hiiuala v. Wood, 195 F3d 1098, 1106-07 (9th Cir.
1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

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

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

14 Upon review of the instant petition for writ of habeas corpus, it does not appear that
15 Petitioner has sought review for his claims in the California Supreme Court. Petitioner states he
16 petitioned for review in the California Supreme Court, but he states that the claims he now raises
17 were not presented in that petition. If Petitioner has not sought relief for his claims in the
18 California Supreme Court, the Court cannot proceed to the merits of those claims. 28 U.S.C. §
19 2254(b)(1). It is possible, however, that Petitioner has presented his claims to the California
20 Supreme Court and failed to indicate this to the Court. Thus, Petitioner must inform the Court
21 whether his claims have been presented to the California Supreme Court, and if possible, provide
22 the Court with a copy of the petition filed in the California Supreme Court, along with a copy of
23 any ruling made by the California Supreme Court.

24 III. Signature

25 The petition is not signed by Petitioner. Local Rule 131 requires a document submitted
26 to the Court for filing to include an original signature. In addition, Rule 2 of the Rules
27 Governing Section 2254 Cases requires a petition for writ of habeas corpus to "be signed under
28 penalty of perjury by the petitioner."

1 In light of the difficulty in having Petitioner submit a new habeas corpus petition,
2 Petitioner is ORDERED to submit a document stating that he submitted the instant petition to the
3 Court and he must sign it under penalty of perjury. The document should contain an original
4 signature. Petitioner is GRANTED thirty (30) days from the date of service of this order to
5 comply with the Court's directive.

6 IV. Respondent

7 In this case, Petitioner names the "CDC" as Respondent. A petitioner seeking habeas
8 corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of him as the
9 respondent to the petition. Rule 2 (a) of the Rules Governing § 2254 Cases; Ortiz-Sandoval v.
10 Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court, 21 F.3d 359, 360
11 (9th Cir. 1994). Normally, the person having custody of an incarcerated petitioner is the warden
12 of the prison in which the petitioner is incarcerated because the warden has "day-to-day control
13 over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); see also
14 Stanley, 21 F.3d at 360. However, the chief officer in charge of state penal institutions is also
15 appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on probation or
16 parole, the proper respondent is his probation or parole officer and the official in charge of the
17 parole or probation agency or state correctional agency. Id.

18 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition
19 for lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326,
20 1326 (9th Cir. 1970); see also Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd
21 Cir. 1976). However, the Court will give Petitioner the opportunity to cure this defect by
22 amending the petition to name a proper respondent, such as the warden of his facility. See West
23 v. Louisiana, 478 F.2d 1026, 1029 (5th Cir. 1973), *vacated in part on other grounds*, 510 F.2d
24 363 (5th Cir. 1975) (en banc) (allowing petitioner to amend petition to name proper respondent);
25 Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial
26 economy, Petitioner need not file an amended petition. Instead, Petitioner may file a motion
27 entitled "Motion to Amend the Petition to Name a Proper Respondent" wherein Petitioner may
28 name the proper respondent in this action.

1 **ORDER**

2 Accordingly, IT IS HEREBY ORDERED:

3 1) Petitioner is ORDERED to SHOW CAUSE within thirty (30) days of the date of
4 service of this Order why the petition should not be dismissed for failure to exhaust state
5 remedies;

6 2) Petitioner is DIRECTED to file a statement that he submitted the instant petition to the
7 Court and he must sign it under penalty of perjury within thirty (30) days of the date of service of
8 this Order; and

9 3) Petitioner is GRANTED leave to file a motion to amend the petition to name a proper
10 respondent within thirty (30) days of the date of service of this Order.

11 Petitioner is forewarned that failure to follow this order will result in dismissal of the
12 petition pursuant to Fed. R. Civil Proc. § 41(b) (A petitioner's failure to prosecute or to comply
13 with a court order may result in a dismissal of the action, and the dismissal operates as an
14 adjudication on the merits).

15 IT IS SO ORDERED.

16 Dated: August 7, 2014

17 /s/ Gary S. Austin
18 UNITED STATES MAGISTRATE JUDGE