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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 ALBERT LEDESMA, III,

12 Petitioner,

13 v.

14 KERN COUNTY SUPERIOR COURT,

15 Respondent.
16

Case No. 1:15-cv-00736-SAB HC

ORDER GRANTING PETITIONER LEAVE
TO FILE A MOTION TO AMEND

ORDER TO SHOW CAUSE

17
18 Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28
19 U.S.C. § 2254. On May 6, 2015, Petitioner filed the instant petition for writ of habeas corpus in
20 this Court. (ECF No. 1). Petitioner has consented to the jurisdiction of a Magistrate Judge
21 pursuant to 28 U.S.C. § 636(c). (ECF No. 8).

22 **I.**

23 **DISCUSSION**

24 **A. Preliminary Review of Petition**

25 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
26 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
27 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
28 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ

of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001). The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42.

B. Leave to File a Motion to Amend Petition and Name a Proper Respondent

Petitioner names "Kern County Superior Court" as the Respondent. A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); see also, Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360.

Petitioner's failure to name a proper 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). However, the Court will give Petitioner the opportunity to cure this defect by amending the petition to name a proper respondent, such as the Secretary of the California Department of Corrections and Rehabilitation ("CDCR"). See West v. Louisiana, 478 F.2d 1026, 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc) (allowing petitioner to amend petition to name proper respondent); Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial economy, Petitioner need not file an amended petition. Instead, Petitioner may file a motion entitled "Motion to Amend the Petition to Name a Proper Respondent" wherein Petitioner may name the proper respondent in this action. Failure to amend the petition and state a proper respondent will

1 result in the petition being dismissed for lack of jurisdiction.

2 **C. Exhaustion**

3 Also, it appears that Petitioner has failed to exhaust his claims in the instant petition. A
4 petitioner who is in state custody proceeding with a petition for writ of habeas corpus must
5 exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on
6 comity to the state court and gives the state court the initial opportunity to correct the state's
7 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
8 Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

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

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

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

28 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
3 indicated to that court that those claims were based on federal law.
4 See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
5 2000). Since the Supreme Court's decision in Duncan, this court
6 has held that the petitioner must make the federal basis of the claim
7 explicit either by citing federal law or the decisions of federal
8 courts, even if the federal basis is "self-evident," Gatlin v.
9 Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
10 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
11 decided under state law on the same considerations that would
12 control resolution of the claim on federal grounds. Hiiivala v.
13 Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
14 88 F.3d 828, 830-31 (9th Cir. 1996);

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

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

20 A petition is a mixed petition if it contains exhausted and unexhausted claims. A mixed
21 petition must be dismissed. However, if a petition contains unexhausted claims, a petitioner
22 may, at his option, withdraw the unexhausted claims and go forward with the exhausted claims.
23 Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) ("[D]istrict courts must provide habeas
24 litigants with the opportunity to amend their mixed petitions by striking unexhausted claims as
25 an alternative to suffering dismissal.").

26 Here, it appears that Petitioner has not sought review of his claims in the California
27 Supreme Court. Petitioner states that he was taken back to Kern County Superior Court in
28 Bakersfield for a reduction of his sentence. (ECF No. 1 at 2). It appears that Petitioner is
challenging the new sentence he received as a result of Proposition 47 and challenging his
probation or parole. It is unclear whether Petitioner raised his claims before the California
Supreme Court. If Petitioner has not sought relief in the California Supreme Court, the Court
cannot proceed to the merits of those claims. 28 U.S.C. § 2254(b)(1). It is possible, however,
that Petitioner has presented all of his claims to the California Supreme Court and failed to
indicate this to the Court. Thus, Petitioner must inform the Court whether each of his claims has
been presented to the California Supreme Court, and if possible, provide the Court with a copy of
the petition filed in the California Supreme Court that includes the claims now presented and a

1 file stamp showing that the petition was indeed filed in the California Supreme Court.

2 **II.**

3 **ORDER**

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Petitioner is GRANTED **thirty (30) days** from the date of service of this Order in
6 which to file a motion to amend the instant petition and name a proper respondent;
7 2. Petitioner is ORDERED to SHOW CAUSE within **thirty (30) days** of the date of
8 service of this Order why the petition should not be dismissed for failure to exhaust
9 state remedies.

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

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15 IT IS SO ORDERED.

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17 Dated: **July 8, 2015**

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UNITED STATES MAGISTRATE JUDGE